The Law of Defamation

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DEFAMATION LAW

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THE LAW OF DEFAMATION - REFORM ISSUES

Summary of Reform Issues

This paper examines the manner in which the law of defamation deals with two important but competing interests: on the one hand protection of an individual's reputation, and on the other hand freedom of expression. The paper notes that the law does not at present achieve an equal balance between these two interests. Instead, the present law confers primacy on protection of reputation. This protection is achieved at the expense of freedom of expression.

It is timely to re-examine the balance between these two competing interests. The Charter of Rights has recently given a constitutional dimension to the protection of freedom of expression. In addition, the fundamental values which underpin the current law of libel and slander are of great age. Professor Raymond Brown summed up this aspect of the law by stating that the

> character of the law relating to libel and slander in the 20th Century is essentially the legacy of its historical development up to the close of the 17th Century. It is this law, with some statutory modifications, that Canadian and other common law jurisdictions have inherited and continue to administer.

(Raymond E. Brown, Law of Defamation, 1987, p. 21.)

Sensitivity to personal disgrace and dishonour was a feature of English society at the close of the 17th century. Since that time there have been enormous social, political and technological changes. Contemporary society is more socially mobile than the structured class society of England in 1700.

The media are now more truly a mass media. Great importance is now attached to the role of the media as a part of the system of checks and balances upon the abuse or excess of power. The constitutional guarantee of freedom of expression provided by the Charter of Rights also makes it appropriate to review the fundamental values reflected in the law of libel and slander to ensure that they meet modern standards.

The reform issues raised for discussion in this paper essentially ask whether we should alter the legal balance in favour of freedom of expression, at the expense of protection of reputation.

The following discussion summarizes the analysis in the main body of the paper. Chapter headings are those of the main text. The Charter of Rights sets the stage for, and implicitly informs the discussion in, all the chapters.

Chapter 3 - Libel and Slander - Should They Remain Separate Torts?

The distinction between the torts of libel (broadly stated, written defamation) and slander (spoken defamation) stems at least in part from the struggle for jurisdiction between the ecclesiastical courts and the common law courts. It is not clear that this distinction has any contemporary relevance.

Comment is sought on the following issues:

o Should the distinction between libel and slander be removed so that an action may be brought only for the combined tort of defamation?

o In any event, should damage be presumed (i.e. not have to be proved), as it is at present with libel and some slanders?

Chapter 4 - What Should be Defamatory Matter?

The scope of what is actionable as "defamatory matter" is wide, but the precise ambit is unclear. One further curiosity is that some forms of words may be actionable as libel or slander even though they do not impinge upon reputation.

Comment is sought on the following issues:

- Should actionable "defamatory matter" include only matter which alters a person's reputation in a manner disadvantageous to that person? A suit in libel or slander places a defendant at a severe disadvantage when contrasted with a suit for malicious falsehood.

- Where a person suffers financial loss, but where there is no alteration to reputation, is it appropriate to permit a suit in defamation? (The plaintiff is not of course without a remedy: a suit in malicious falsehood would lie in an appropriate case).

- Does the distinction between actions for defamation and actions for malicious falsehood make sense at all? Does the protection of reputation deserve such a procedural advantage over protection of financial interests?

- Should "defamatory matter" exclude that which is trivial or slight? Does it make a difference to the answer whether damage is presumed? If damages had to be proved in each case, the difficulty of doing so might sufficiently discourage suits for petty insults.

- Is the supposed opinion of "right thinking persons" an appropriate standard to judge damage to reputation? Is the opinion of the plaintiff's peers a better standard? If pure reputation continues to be protected, these are important questions. If financial loss must be proved, the questions become irrelevent.

Chapter 5 - Death of a Party to an Action

Libel and slander are treated differently from other torts in that the death of either party to a defamation suit ends the cause of action.

Comment is sought on the following issues:

- Should an action in libel or slander survive the death of either party? If so, should recovery of general damages be permissible, or only actual losses?

Chapter 6 - Defamation of the Dead

No action may be brought based upon defamation of a dead person. Arguably this principle encourages an "open season" for some sections of the media after a person's death.

Comment is sought on the following issues:

- Should a new right of action be created based upon defamation of the dead?

- If such a right of action is created, how should the following concerns be dealt with:

    - Any new right of action must necessarily interfere with freedom of speech. Can this further interference with freedom of speech be justified by reference to the existence of a problem of "yellow journalism" for which there may be no empirical evidence?

- Should the availability of the right of action be limited:
  - as to the standards of liability: only on proof of knowledge of falseness of the defamatory material?
  - as to the standing to bring the action: relatives only, friends, colleagues, general public?
  - as to the availability of remedies: general damages, vindication or rectification (and costs) only?
  - as to time limits: one year, three years, five years after the death of the defamed person?

- Should the law impose upon historical researchers and investigative journalists the onus of proving facts in a court of law, even upon a civil standard of proof, as a consequence of publishing material about a deceased person?

Chapter 7 - Defamation in a Work of Fiction

Peculiar problems arise where the defamatory matter was published in a work of fiction. In such cases the essential issue is whether a substantial number of persons would regard the material as referring to the plaintiff (Jones v. Hulton [1909] 2 K.B. 444 per Lord Alverstone C.J.). If this is established the defendant's choices are severely circumscribed as, by definition, the material is a work of fiction and the defences of truth and fair comment (which require a substratum of facts) would usually not be available.

Comment is sought on the following issues:

o Should a new defence of "literary privilege" be created. where the defamatory matter is contained in a publication which generally would be viewed as a genuine work of fiction?

- Alternatively, should the remedies available to the plaintiff, or the procedural requirements of the action, differ in cases of literary libel, to lessen the publisher's risk?

- Should the cause of action based on a work of fiction have to include an element of malice on the part of the defendant, to be pleaded and proved by the plaintiff? In the alternative, should a defence based on literary privilege be obliged to show that the defamatory matter was published in good faith (i.e. without malice) in order that "literary privilege" should not become artistic license?

Chapter 8 - Defamation of a Group

No action may be brought for defamation of a group, unless the group is so small that a defamatory statement can be taken as directed at each and every member, in which case an action will lie at the suit of each member. For example, the publication of racist propaganda is not actionable as defamation no matter how false, malicious and damaging (although it may be punishable as a crime.)

Comment is sought on the following issue:

- Should a right of action in defamation be created for cases of defamation of a group? If so, should it be subject to any limits beyond those of an ordinary individual action for libel or slander?

Chapter 9 - Standard of Care: Unintentional Defamation

Liability for the publication of defamatory matter is very strict. A publisher may be liable for fiction which innocently defames a person of whose existence the publisher was ignorant (Hulton v. Jones [1910] A.C. 20). Even if the statement is true of the individual about whom it is published, the publisher may be strictly liable for defaming another individual unknown to the publisher, but considered by those who know the plaintiff to be the intended subject of the statement (Newstead v. London Express [1940] 1 K.B. 377). This high standard of responsibility may no longer be desirable and in the best interests of the community.

Comments are sought on the following issues:

o Should the law allow a suit in defamation only where the defamatory matter is published in circumstances involving intent, or malice, or recklessness, or negligence of the defendant?

o If so, should one or more of these elements need be pleaded and proved by the plaintiff to establish the cause of action? Or should falsity of the material create an onus on the defendant to prove a lack of negligence, essentially a "due diligence" defence?

Chapter 10 - Justification (Truth)

The defence of truth is not an easy one to use.
If a defamatory remark is made (or an innocent remark is reasonably capable of a defamatory meaning in the light of extrinsic facts), the defendant takes the complete risk that the defamatory meanings are true. The harshness of this rule is greatly heightened by two subsidiary rules.

> In the first place the onus of proving the truth of the defamatory meaning is placed on the defendant (and an unsuccessful attempt to do so might be considered an exacerbation of the wrong with regard to the quantum of damages). In the second place, even if the defendant expressly states that he is merely repeating someone else's opinion, and he reasonably believes the latter to be correct and that he should repeat it, this lack of "fault" will furnish no defence.

(Paul C. Weiler, "Defamation, Enterprise Liability, and Freedom of Speech",(1967),17 University of Toronto Law Journal 278 at 281).

Comment is sought on the following issues:

o Should the defendent continue in all cases to have the burden of proving that the defamatory material was true?

o Should section 23 of the Libel and Slander Act be recast so that the justification of one allegation does not operate as a defence to a suit upon a separate, false allegation?

o Alternatively, should the court be required to have regard to the whole of the publication (and not merely to that part selected by the plaintiff) which is the context for the allegations sued on, and the extent to which the defendant justifies the matter concerning the plaintiff in that publication?

Chapter 11 - Fair Comment

The defence of fair comment allows a broad area of freedom to state one's opinion about the consequences of certain statements of fact. However, because the stated facts upon which the opinion is based must themselves be true - with strict liability on the part of the defendant again being the rule -the defence is limited to relatively narrow circumstances. It will not, for example, be enough that the defendant believed on reasonable grounds that the facts upon which the opinion was based were true.

Comment is sought on the following issues:

- Should the elements of the defence be prescribed by legislation?

- Should the existence of malice on the part of the defendant be relevant to the defence?

Chapter 12 - Absolute Privilege (Parliamentary Privilege, Judicial Privilege and Executive Privilege)

There are occasions which the law considers to be of such importance that the publication of an untrue defamatory statement is tolerated as a necessary risk incidental to the pursuit of a greater good. Publication of defamatory material arising on these occasions benefits from absolute privilege, and no suit may be maintained. Such privilege attaches to parliamentary and judicial proceedings and to certain communications of the executive arm of government. Because of the absolute nature of this privilege - it is not open to the court even to inquire whether the privilege has been intentionally abused - it is necessary to scrutinize this privilege carefully.

Comment is sought on the following issues:

- Is any change necessary to the present common law relating to parliamentary privilege?

- Should judicial privilege extend to any matter which is published in the course of the proceedings, or in any official record, of a court in Ontario or elsewhere?

- Should the privilege extend to similar matter published in the course of an arbitration under the authority of a provincial statute? Is this the natural extension of a general applicability to quasi-judicial proceedings? Where should the line be drawn? Is adjudication, or an obligation to follow the rules of natural justice, enough?

- Should executive privilege be limited or abolished?

- Should other aspects of the defence of absolute privilege be settled by suitable legislation?

Chapter 13 - Qualified Privilege

If a person has a legal, social or moral duty to communicate certain information, then its communication may not lead to liability even if it is defamatory. This is called a qualified privilege to publish, as liability will nevertheless arise if publication was motivated by malice. The purpose of qualified privilege is to encourage the making of statements where this will serve a socially desirable purpose. However, he reasonable belief of the person publishing that the occasion is privileged is irrelevant. If the defendant is mistaken as to the existence of the necessary duty, then the defendant will be liable for communicating the material.

Comment is sought on the following issues:

- Should the publisher be required to show a duty to publish in order to benefit from qualified privilege? Should it be sufficient that the recipient has an interest or apparent interest in receiving the information or that the publisher has a reasonable belief in that interest?

- Should it be relevant whether the matter was published for reward?

- Should malice continue to invalidate the defence?

Chapter 14 - Qualified Privilege: Public Figures

Since the decision of the United States Supreme Court in New York Times v. Sullivan (1964), 376 U.S. 254, American law has given qualified privilege to the publication of otherwise defamatory material about "public figures", if the publisher acts without malice. This has not yet been taken up in other common law jurisdictions. Although the constitutional justification for Sullivan may not find an exact parallel in Canada, it is worth considering whether a similar approach should be adopted in Ontario.

Comment is sought on the following issue:

- Should Ontario law allow a qualified privilege for the publication of defamatory material about public officials or public figures?

Chapter 15 - Statutory Qualified Privilege: Fair Report

Sections 3 and 4 of the Libel and Slander Act protect "fair and accurate" reports of certain specified proceedings. There are a number of qualifications to this important provision - e.g. it is available only to reports published in a newspaper (as defined) or in a broadcast. The protection is lost if the defendant acted maliciously.

Comment is sought on the following issues:

- Should the statutory defence be renamed "fair report"?

o Should protection be accorded to a "fair and accurate report" in whatever form? Can an inaccurate report be fair? Should statutory protection be limited to reports published in newspapers or by broadcast?

o Should the list of protected occasions be extended so that it includes:

(A) proceedings of a legislature whether in Canada or elsewhere, including a committee of a legislature;

(B) proceedings in public of any international organization of countries, of parliaments or of governments, or their representatives;

(C) proceedings in public of any international conference at which governments are represented or of any international court or arbitral tribunal;

(D) proceedings in public of a municipal council, school board, board of education, board of health, or any other board or local authority formed or constituted under any public act of a legislature in Canada, or of a committee of any such municipal council or board;

(E) proceedings of any association, whether incorporated or otherwise, or any part or committee of them, relating to a member of the association or to a person subject to control by the association. There seems no point in enumerating categories of association - those formed to promote the arts, business, sport etc. If the matter satisfies the public interest/public concern test, then it should not matter what type of association is involved;

(F) proceedings at a general meeting of a body corporate;

(G) proceedings of any public meeting;

(H) a synopsis of any record or document kept by any government department or agency being a record or document open to public inspection; and

(I) proceedings in a meeting of commissioners authorized to act by or pursuant to statute or other lawful warrant or authority?

- o Should the only limitations on the right to publish with qualified privilege be:

(A) the matter arises out of occasions contained in the statutory list;

(B) the matter is of public interest or concern (what guidelines are desirable on this point?)

(C) the matter is not blasphemous, seditious or indecent (now subsection 3(5));

(D) the publication is not tainted by malice; and

(E) the plaintiff was not denied the right of explanation or contradiction by the defendant (now subsection 3(7))?

o Should qualified privilege for reports of court proceedings be extneded to publication in any form, not merely to newspapers and broadcasts, and the requirement of contemporaneous publication removed?

Chapter 16 - Retraction of Unintentional Defamation

Section 5 of the Libel and Slander Act contains the important defence of retraction. However, it appears that this defence has not been widely used.

Comment is sought on the following issues:

o Should the court be given a discretion to order the defendant to retract or correct the libel, as well as or instead of paying damages? The court would need the power to specify the content, manner of publication, frequency of publication and so on, of the retraction statement.

- Should the defence be available:
  - to publishers other than newspapers and broadcasters?
  - to allegations of criminal charges?
  - to publishers who have made retractions they can demonstrate to have been effective, even if not technically complying with the present statutory rules? Should the factors contributing to effectiveness be specified, such as manner, timing and distribution of the retraction?

Chapter 17 - Mere Distribution of Defamatory Matter

As we have noted, the standard of liability imposed upon a person who publishes defamatory material is very strict. At its most basic level, "publication" simply means the communication of the material to some person other than the plaintiff. In order to mitigate the harsh results of this rule, the courts have developed a defence of innocent dissemination. These disseminators - booksellers, libraries, newsvendors etc - are not liable if they can prove they were not negligent in failing to prevent the dissemination of the libel.

> Although in the abstract a more favourable attitude toward disseminators as defendants may appear justified, there seems to be no more reason for preferring them to publishers, for example, than for making such distinctions in the liability of different members in the production and distribution of consumer products, nor for making the requirements of proof of negligence so stringent.

(Weiler, "Defamation, Enterprise Liability, and Freedom of Speech" (1967), 17 University of Toronto Law Journal 278 at 282).

Comment is sought on the following issues:

- Should the common law defence of innocent dissemination be made available to a mere distributor of publications, whether for reward or otherwise, i.e. someone who is neither the author of, nor the printer of, the material?

- If a distributor of publications may be liable in damages if he or she knew, or ought to have known, that the publication contained material defamatory of the plaintiff, should proof of this lie with the plaintiff?

- Should anticipatory injunctions be made more readily available to defamed persons, either absolutely or in return for exempting innocent distributors from liability?

Chapter 18 - Damages

The assessment of damages is exceedingly difficult where injury to reputation is at issue. Juries now receive no guidance and awards vary widely. Although it is unusual in tort law, punitive damages are available in cases of defamation. These damages are given in excess of actual losses, to express disapproval of the conduct of the person who has published the defamation.

Comment is sought on the following issues:

- Should the court be required to specify the minimum and maximum amounts within which an award of damages shall be assessed by the jury?

- o Should the criteria to be considered in assesssing damages be codified? Such a measure would guide the court in fixing a range of damages.

- o Should punitive (or exemplary) damages be abolished?

Chapter 19 - Procedure

Procedural complexity is a characteristic of an action in libel or slander. There are also evidentiary problems for a plaintiff where the defamatory matter was published by the electronic media.

Comment is sought on the following issues:

- o Should the requirement to give notice befroe action be extended to any action against a publisher in defamation, not merely to an action based on libel in a newspaper or broadcast?

- o Should the requirement to publish an address (in order to obtain the benefit of the notice and retraction rules) apply to any periodical publication, not merely to newspapers?

- o Should a general limitation period be fixed at two years for any action in defamation, running from the date of publication? If so, should the special three month limitation period be abolished for suits against newspapers and broadcasters?

- o Should the Act provide a right of access to broadcast tapes, exercised by giving a demand before action? Should publishers have a means of procedural relief from frivolous claims?

- o Should the sanction for wrongful non-compliance with a demand be specified?

THE LAW OF DEFAMATION - REFORM ISSUES

PART 1 - INTRODUCTION AND GENERAL ISSUES

Chapter 1 - Introduction

Defamation law is often seen as a tale of two interests - the individual's interest in his or her reputation, on the one hand, and society's interest that information should pass freely, on the other. The substance of the law of libel and slander involves a balancing of these two interests - limiting freedom of expression in order to protect an individual's reputation. In the words of Edgerton J. in Sweeney v. Patterson 128 F. 2d 457 at 458, "whatever is added to the field of libel is taken from the field of free debate". (Cited in "Libel Law, Fiction, and the Charter" by Darlene Madott, (1983), 21 Osgoode Hall Law Journal 741 at 750).

Some people's perceptions about the state of libel and slander law in Ontario include:

- **The substantive law leans heavily in favour of the plaintiff,** who is claiming that his or her reputation has been assailed, and correlatively burdens the defendant, who is protecting his or her freedom of expression.

- **The procedural law is subject to such technicality and delay** (and hence expense) that it penalizes the party (plaintiff or defendant) with a genuine case who wishes to have it resolved by the court, while lending itself to abuse by unmeritorious litigants.

- **The Charter may alter the emphasis of libel and slander law.** Instead of a body of law which, at present, emphasizes the sanctity and value of reputation at the expense of freedom of speech, the Charter requires a body of law which protects freedom of speech, subject only to abridgement as necessary for the reasonable protection of reputation.

Protection of Reputation

The extent to which the common law has developed in a climate emphasizing the value of one's reputation is illustrated by the following aspects of libel and slander law:

- **Falsity of the defamatory matter is presumed.** If the defendant is able to establish that the words themselves and any reasonable inference to be drawn from them are true then the defence of truth, or justification, will be made out. Until this heavy onus of proof is discharged by the defendant the court will presume that defamatory words are false.

- **In the case of libel and of certain slanders, damage to the plaintiff is presumed.** If the defendant is able to establish the difficult proposition that the plaintiff suffered no loss at all as a result of publication of the defamatory matter, then the action will fail. Until this is done it is presumed that the plaintiff has been damaged.

- **Liability does not depend on fault or negligence.** A defendant may be liable in libel or slander even though the defendant acted without fault or negligence, e.g. by publishing material which coincidentally defames a person whose existence is not known to the defendant: Hulton v. Jones [1910] A.C. 20.

- **The law protects reputation** (i.e. the perception of the plaintiff in the community at large) not character (i.e. the true moral nature of the plaintiff). If the plaintiff is successful in obtaining a judgment for injury to his or her reputation the defendant is not entitled to lead evidence (in mitigation of damages) establishing that the plaintiff's reputation is ill founded: Hobbs v. C.T. Tinling & Co. Ltd. [1929] 2 K.B. 1.

- **The threshold of what may constitute defamatory matter is very low** indeed. "Defamatory comments may range from trivial insults to the most calculated divestiture of the important aspects of the plaintiff's reputation." Williams, The Law of Libel and Slander in Canada, 2nd edition, p.3. One result of this low threshold is that a minority of the decided cases concern what is defamatory matter, the great majority dealing rather with whether the defendant has made out one of the available defences.

These features of the law indicate the great importance that it attaches to the protection of reputation. Such protection of reputation has been achieved at the expense of freedom of expression. The great value attached by the law to reputation may be thought to reflect an old fashioned and perhaps outmoded concept of the importance of status or class. In England, when the still current rules were being formed, consciousness of class and status were matters of much greater concern and importance than they are in Canada today. One consequence of this change may be the need to adjust the present legal balance between protection of reputation and freedom of expression.

Procedural Law

It is almost an aphorism that procedural aspects of a libel suit are of great technicality and complexity. An exasperated Lord Diplock commented as follows:

> This is an ordinary simple case of libel. It took fifteen days to try; the summing-up lasted for a day; the jury returned thirteen special verdicts. The notice of appeal sets out seven separate grounds why the appeal should be allowed and ten more why a new trial should be granted, the latter being split up into over forty sub-grounds. The respondents' notice contained fifteen separate grounds. The costs must be enormous. Lawyers should be ashamed that they have allowed the law of defamation to have become bogged down in such a mass of technicalities that this should be possible.

Boston v. Bagshaw [1966] 2 All E.R. 906 at 912, quoted in Julian Porter and David A. Potts, Canadian Libel Practice, 1986.

This complexity applies not only to the conduct of the trial, but also to the manoeuvring by the parties before suit and to the pleadings and interlocutory steps. For example, in Littleton v. Hamilton (1974), 47 D.L.R. (3d) 663 at 666, Dubin J.A. stated:

> ...it has been said many times that in actions of libel the parties are bound by their pleadings and careful regard must be given to the pleadings before matters are left for the consideration of the jury.

Porter and Potts comment (Canadian Libel Practice, p. 41) that "regardless of how lenient courts are with regard to other civil pleadings, libel pleadings are still strictly construed and the draughtsman must be precise."

Examples of this complexity and technicality are:

- **The necessity to plead exact words.** The plaintiff must plead the exact words; an approximation of the words will not suffice. This is a particular problem where the alleged libel was broadcast rather than printed. A prospective plaintiff has difficulty obtaining access to broadcast tapes or even to authoritative transcripts.

- **The plaintiff must set out in the statement of claim the particular passages considered to be defamatory.** It will not suffice to include the whole chapter or article complained of: DDSA Pharmaceuticals Ltd. v. Times Newspapers [1972] 3 All E.R. 417, approved in Gouzenko v. Doubleday Canada Ltd. (1981), 32 C.R. (2d) 216.

- **An action on the literal meaning of words is a separate cause of action from an action on an innuendo or inferential meaning.** A plaintiff may rely upon only such innuendo meanings as he or she has pleaded and not upon any others which may come to mind at the trial. This leads to abstruse argument on what may be the "natural or ordinary" meaning of a particular form of words.

- **Use of the defence of truth is discouraged** by the rule that, if it fails, aggravated damages may be awarded to the plaintiff.

Interlocutory manoeuvres which exploit the procedural intricacies of the law are a commonplace of a libel action. Such manoeuvres create delay and increase the cost of the proceedings. Chapter 19 of this paper examines some of the procedural problems more fully.

The Charter

The Charter is the supreme law of Canada. Freedom of expression is guaranteed by section 2(b) of the Charter and accordingly any abridgment of this freedom must be supportable under either section 2(b) (it does not offend the content of the freedom of expression) or section 1 (it is a reasonable limit on the freedom.)

The Charter requires a re-evaluation of laws that purport to limit or abridge rights or freedoms that it guarantees. Because of the fundamental nature of this exercise it is appropriate to address this issue first: see Chapter 2.

The Sequence of an Action for Libel or Slander

In a suit for libel and for those slanders which are actionable per se (i.e. without proof of special damage) the plaintiff must prove:

(a) that the published matter referred to him or her;

(b) that the matter was defamatory of him or her; and

(c) that the matter was published by the defendant, or in circumstances in which the defendant was responsible for the publication.

The plaintiff in such a suit receives the benefit of three presumptions. It is presumed that the published matter is false. It is presumed that the publication was malicious. (In this context "malice" has a broad meaning, having the flavour that the defendant intended to defame the plaintiff. "Malice" is not confined to spite or ill will: Carter-Ruck on Libel and Slander, 3d ed. (1985), p. 31.) It is presumed that the plaintiff has suffered damage as a result of the publication. (In an action for most slanders the presumption of damage does not apply. In such cases the plaintiff must prove damage as an element of the cause of action). Part 2 of this paper examines the elements of the cause of action.

The defendant may contest the action by contending that the plaintiff has not established one or more of the elements of the tort. He or she may also resort to the various defences which exist either at common law or under the Libel and Slander Act:

- (a) justification (truth);
- (b) fair comment;
- (c) absolute privilege;
- (d) qualified privilege;
- (e) fair report protected under the Libel and Slander Act sections 3 and 4;
- (f) retraction of an unintentional publication of defamatory matter pursuant to section 5 of the Libel and Slander Act; and
- (g) innocent dissemination.

Part 3 of this paper examines the defences.

Assuming the plaintiff establishes a prima facie case, and the defendant is unable to establish one or other of the available defences, then it remains for damages to be assessed. (Apart from an injunction to restrain further publication of the defamatory matter, an award of damages is the only remedy available to the successful plaintiff). As in other torts, damages for libel or slander are intended to be compensatory but in certain circumstances punitive or exemplary damages may be awarded. Part 4 of this paper examines the remedies available to a successful plaintiff. It also discusses some technical rules of procedure relating to defamation actions.

Chapter 2 - The Charter and Libel and Slander Law

The Canadian Charter of Rights and Freedoms gives constitutional recognition to the fundamental freedom of "thought, belief, opinion and expression, including freedom of the press and other media of communication" (paragraph 2(b)).

The Charter guarantees the rights and freedoms set out in it "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society" (section 1). The fundamental issue is whether the constitutional guarantee of freedom of expression must result in change to the strict liability at common law for the publication of defamatory material, or otherwise change the procedural or substantive rules relating to this area of the law.

Application of the Charter

Much of the law of defamation is still found in the common law, the result of judicial decisions over the years. According to recent Supreme Court of Canada decisions, the Charter applies to the common law only to the extent that the law is invoked by a government, or by a court to vindicate or enforce public interests: Retail, Wholesale and Department Store Union v. Dolphin Delivery Limited [1986] 2 S.C.R. 573, British Columbia Government Employees' Union v. British Columbia [1988] 2 S.C.R. 214.

The Libel and Slander Act, and any portion of the common law that it may be taken to have incorporated, is subject to the Charter. The application of the Charter may make its reform a matter of constitutional necessity and not simply a matter of legal policy. Further, any statutory amendment to the common law along the lines discussed in this paper would itself have to meet the Charter standards. The Charter thus constrains reform even where it may not require it.

Interpretation of the Charter

The courts have said that the rights and freedoms of the Charter "may be interpreted generously, resolving ambiguities in their favour, with a view to giving them full recognition and effect": Retail, Wholesale and Department Store Union etc. v. Government of Saskatchewan [1985] 5 W.W.R. 97 at 131.

In particular "the constitutional guarantee [of freedom of expression] should be given a broad and liberal interpretation": R v. Kopyto (1987), 62 O.R. (2d) 449 at 465.

That being said, however, the courts have not prescribed the limits of free speech as a matter of principle. That is not how the Charter works. One must consider the extent of freedom of expression in itself - how far does it go, what limits does it allow inherently? One must also consider other constitutional values protected by the Charter. Reputation could be one of them. It is arguable that someone's reputation is an aspect of security of the person, within the meaning of the guarantee of section 7 of the Charter. Acceptable rules on defamation may involve balancing two parts of the Charter.

Finally, the process must consider whether legal rules that do violate Charter values are nevertheless legitimate because "demonstrably justified in a free and democratic society" within the meaning of section 1 of the Charter. This narrows the discussion to the concrete rule in issue, and the context in which it operates.

As a result, not much can be said in the abstract about what the Charter requires of the law of defamation. Comments on the issues raised in this paper will have to reflect the values of free speech and the governmental policy reasons for imposing any limits on them.

Meanwhile, the courts will continue to indicate some of the content of freedom of expression, as the Supreme Court has recently done in Attorney General of Quebec v. La Chaussure Brown's Limited (1988), 90 N.R. 84, probably without defining its limits in absolute terms. They will also expand our understanding of section 1, as the Supreme Court shows in Andrews v. Law Society of British Columbia (2 February 1989, unreported). It is possible, for example, but far from certain, that limits on free expression will prove harder to justify under section 1 than limits on some other Charter values.

This paper does not attempt to resolve conclusively the dictates of the Charter in relation to the law of libel and slander, as this is not possible in any event. At this time the Government hopes to receive views on the most desirable policies to be implemented having regard to the Charter, not to canvass views on what the Charter itself might ultimately require.

Chapter 3 - Libel and Slander - Should They Be Separate Torts?

Common law provides two separate civil actions for the publication of defamatory matter, an action for libel and an action for slander. Generally speaking a defamatory statement is a libel if it is in some permanent (usually written) form, but a slander if it is transient (generally an oral comment). The distinction between the two is that libel is actionable without proof of damage (damage is presumed) while slander generally requires proof of actual damage. (Certain slanderous statements do not require proof of actual damage, e.g. an imputation that a person is guilty of certain kinds of criminal offences or that a person suffers from certain contagious diseases, an allegation of unchastity in or adultery by a woman, and an allegation that a person is unfit for a profession or calling). A further distinction is that the publication of a libel may be a criminal offence as well as a tort (i.e. a civil wrong), whereas a slander is a tort only.

Historical Background.

Professor Fleming describes the distinction between the twin torts as the result less of conscious policy than of a series of historical accidents. (The Law of Torts, 6th ed., p. 515). The distinction arose to some extent out of the competition between the common law courts and the ecclesiastical tribunals in the early sixteenth century.

Subsequently the distinction between libel and slander has been rationalized on the present basis of a distinction between "permanent" and "transient" forms of publication: Thorley v. Kerry (1812) 4 Taunt. 355. However the distinction nowadays is neither as neat nor as logical as this summary suggests. For example it is not settled at common law whether defamatory material published live over radio, with no permanent tape or other record, is libel or slander: Finlay, "Defamation by Radio" (1941), 19 Can. Bar Rev. 353. In most jurisdictions it has been necessary to resolve the status of broadcast defamation by legislation: Libel and Slander Act RSO 1980 c. 237, section 2; Broadcasting and Television Act 1942 (Aust), section 124; Cable and Broadcasting Act 1984 (Eng) section 28.

Policy Considerations

Undoubtedly the requirement that an action in slander must (generally) be accompanied by proof of special damage has discouraged some trivial litigation. This is an important consideration - the breadth of the accepted definition of "defamatory matter" is such that even trivial insults are actionable. However, more direct and effective means to this end may be available without special damage requirements for some kinds of defamation. The definition of defamatory matter could exclude the trivial, for example. Such proposals will be discussed later in this paper.

The difficulty of classifying a publication as either libel or slander has already been mentioned. Erudite articles have canvassed whether defamatory sky-writing would be libel or slander: see the articles cited by Finlay in his article "Defamation by Radio" (above) at p. 353. Debate continues whether the test of distinction is permanence versus transience, or whether the distinction lies between the organ to which the defamatory matter is communicated (the eye or the ear), or a combination of both such tests. Such arguments are, it is submitted, sterile and destructive.

The importance of the distinction between methods of publication may lie in measuring the damages to be awarded to a successful plaintiff, not in creating two distinct causes of action.

Previous Examination of the Issue

A Select Committee of the House of Lords recommended the removal of the distinction as long ago as 1843, as did the Faulks Committee (another English committee) in 1975. No action has yet been taken in England to implement this recommendation.

The Uniform Defamation Act makes no distinction, and the laws of five provinces and both territories follow suit. Mr Justice Linden has recommended the abolition of the distinction: Canadian Tort Law, 4th ed., 1988, p. 641. The British Columbia Law Reform Commission said the same thing in its 1985 Report on Defamation, at p. 26.

In New Zealand the distinction was abolished in 1954. The abolition was reviewed and approved in the Report of the Committee on Defamation (New Zealand) in 1977. Abolition of the distinction was also recommended by the Australian Law Reform Commission in 1979 (ALRC 11, para. 76) although this recommendation (along with most of the other recommendations in the report) has not been implemented. The distinction has been abolished in two states in Australia (Queensland in 1899 and Tasmania in 1957) and was abolished in New South Wales between 1847 (implementing the 1843 recommendations of the House of Lords Committee) and 1974.

On the other hand the Porter Committee (another English committee) in 1948 favoured the retention of the distinction. The New South Wales Law Reform Commission in 1971 recommended a return to the common law distinction, although it insisted that the practical effects of the distinction should not be resurrected. In each case the argument for retaining the distinction was to discourage frivolous actions.

Reform Issues

Comment is sought on the following issues:

o Should the distinction between libel and slander be removed so that an action may be brought for the combined tort of defamation?

o In any event, should damage be presumed (i.e. not have to be proved), as it is at present with libel and some slanders?

PART 2 - THE CAUSE OF ACTION

Chapter 4 - What Should Be Defamatory Matter?

There is a divergence between what may constitute defamatory matter at common law and what may do so in some jurisdictions which have defined it by statute. In addition there is no generally accepted comprehensive definition of defamatory matter at common law.

Some of the common law formulations are:

- "false statements to [the plaintiff's] discredit". Scott v. Sampson (1882), 8 Q.B.D. 491.
- "a publication....which is calculated to injure the reputation of another by exposing him to hatred, contempt or ridicule". Parmiter v. Coupland (1840), 6 M & W 105.
- words which "tend to lower the plaintiff in the estimation of right thinking members of society generally." Sim v. Stretch [1936] 2 All E.R. 1237.

> "not only is the matter defamatory if it brings the plaintiff into hatred, ridicule, or contempt by reason of some moral discredit....but also if it tends to make the plaintiff be shunned and avoided and that without any moral discredit." Youssoupoff v. Metro-Goldwyn-Mayer Pictures Ltd. (1934), 50 T.L.R. 581.

In substance the meaning of "defamatory matter" at common law is a synthesis of all the above.

Some jurisdictions have enacted a statutory definition of defamatory matter. Those in favour of codification may propose something like this:

> For the purposes of this Act, defamatory matter is published matter concerning a person which tends -
>
> (a) to affect adversely the reputation of that person in the estimation of ordinary persons;
> (b) to deter ordinary persons from associating or dealing with that person; or
> (c) to injure that person in his occupation, trade, office or financial credit.

Draft Unfair Publication Act subsection (1) recommended by Australian Law Reform Commission in Report no. 11 (1979).

The Uniform Law Conference of Canada has recommended against codification, on the ground that codifying either repeats the comon law rules without adding much certainty, or it changes them without justification in policy: Proceedings of the Sixty-Ninth Annual Meeting, 1987, at p. 117. The B.C. Law Reform Commission took the same view: Report, at p. 28.

Protection of Reputation Only or Something Wider?

In considering any comprehensive definition of "defamatory matter" a threshold question arises - should defamation be confined to the protection of reputation? Under the statutory formulations false statements which cause financial loss but which do not injure reputation are actionable as defamation. In both the Queensland definition and the definition recommended by the ALRC, damage to reputation is only one of three alternative grounds for a suit in defamation. In addition, an imputation tending to injure a person in his or her profession or trade is actionable even though the imputation may not impinge upon the person's reputation. Such imputations are not actionable in defamation at common law.

Other Torts Relating to the Publication of False Statements

In considering the legitimate scope of the tort of defamation it should be kept in mind that false statements not actionable for defamation may be actionable as malicious falsehood or slander of title.

Slander of title originally involved a person falsely and maliciously alleging that the title to property (realty or personalty) of another person is bad, thus causing financial loss (e.g. through the collapse of a prospective sale). Gradually the scope of the action expanded to embrace aspersions not only on title but also on the quality of land or goods, such as knowingly making false assertions that a person's stock in trade was inferior or, quaintly, asserting that a person's house was haunted: Manitoba Press v. Nagy (1907), 39 S.C.R. 340. Such assertions became actionable if financial loss was suffered and the false statement was published maliciously. In this context it will be remembered that "malice" does not necessarily connote spite or ill-will. It is sufficient if the publication were made for an improper motive or for an ulterior purpose, a significantly weaker test: Schneider v. Leigh [1955] 2 Q.B. 195.

That being said, slander of title is really a side issue. Malicious falsehood is a more fruitful alternative to the traditional action in defamation. There are major differences between an action for libel or slander and an action for malicious falsehood.

- In a suit for libel or slander the falsity of the matter is presumed. It is for the defendant to establish the truth of the matter if he or she wishes to rely upon the defence of justification (i.e. truth). By contrast in an action for malicious falsehood the plaintiff must establish the falsity of the words published.

- In a suit for libel (and an action for some slanders) damage is presumed. In a malicious falsehood actin the plaintiff must prove his or her loss, except in a few circumstances prescribed by section 19 of the Libel and Slander Act.

- The existence of express malice (i.e. spite or ill-will) on the part of the defendant is an element of the tort of malicious falsehood which must be pleaded and proved by the plaintiff. The existence of express malice on the part of the defendant is not essential in an action for libel or slander, although malice in the wider sense of an improper motive may negate a defence of fair comment or a claim of qualified privilege. Also, in an action for libel or slander, the existence of malice will be relevant in the assessment of damages. In short, a statement need not be malicious in order to be defamatory, but it must be malicious in order to constitute a malicious falsehood;

- A statement may be unintentional and innocent and still be defamatory. In Hulton v. Jones [1910] A.C. 20, a defamatory statement used a name which was intended to be fictitious - Artemus Jones -but which coincidentally was the name of an actual person. The publisher was held liable. Malice on the part of the publisher is a necessary element in an action for malicious falsehood;

- The publication of a statement that is defamatory may expose the defendant to prosecution for a criminal offence: Criminal Code R.S.C. 1970 Chap. C-34 section 265. The publication of a malicious falsehood (which is not defamatory) is not attended by any criminal consequences.

As discussed earlier, the action for defamation has been confined to the protection of reputation, while the action for malicious falsehood has not been so limited. In considering the scope of defamation, what should be done with the following kinds of statement?

- False statements which cause financial loss but which do not injure reputation.

- False statements which cause others to "shun and avoid" the plaintiff, but which do not injure the plaintiff's reputation.

- Trivial insults.

False Statements Causing Financial Loss

One distinction between the common law and the statutory definitions concerns the extent to which statutes include as defamatory matter any matter that causes financial loss to a person without injuring the person's reputation. The distinction lies between a statement which reflects adversely upon a person's reputation as well as causing financial loss, and a statement which causes financial loss but which makes no adverse reflection upon the person's reputation or even upon his or her conduct.

For example at common law it would be defamatory to state of a dentist that he or she is an incompetent dentist. Such a statement would reflect adversely upon the person's reputation as a professional, while also being likely to cause financial loss to the person's dental practice. However at common law it would not be defamatory to state of the same dentist that his or her practice is located in a very insalubrious part of town, even if that statement were false and caused financial loss. (The statement would be actionable as a malicious falsehood). Probably both statements would be actionable under the Libel and Slander Act.

Should all such statements be actionable as defamation? Does it matter whether all the plaintiff's procedural advantages in defamation are retained in the present exercise of reform? Does it make sense to restrict these advantages, or the cause of action generally, to cases of assaults on reputation narrowly conceived? How much should the law be governed by its traditions on this point? Is the constitutional protection of free speech relevant here, or is the action for malicious falsehood as great as infringement on this freedom as is an action for defamation?

Statements Which Deter Association with a Person

It is recognized at common law that a statement may be defamatory if it will tend to make other people shun or avoid the plaintiff even though it does not involve any suggestion of moral blame: Youssoupoff v. MGM Pictures Ltd. (1934), 50 T.L.R. 581, and Boyd v. Mirror Newspapers Ltd. [1980] 2 N.S.W.L.R. 449. In the latter case Hunt J. used as examples of this kind of defamatory matter statements that the plaintiff is insane, that he or she has been raped, as well as any imputation that displays the plaintiff in a ridiculous light, notwithstanding the absence of any moral blame on the plaintiff's part. In Youssoupoff's case the defamatory matter consisted of a suggestion in a film that the plaintiff had been seduced or ravished.

Statements of the kind mentioned by Hunt J. are more in the nature of misfortunes rather than faults. Attributing a misfortune to a person should not, notionally, diminish the reputation of a person. Despite the logic of this statement, however, the common law does not take such a narrow view of "reputation". The comment itself may not be intrinsically disparaging but it will nevertheless alter in a negative way society's perception of the person.

The literature does not seriously suggest that an action in defamation should not lie for such statements.

The Standard of Right Thinking Persons.

A matter is not defamatory even if it does tend to cause people to shun or avoid the plaintiff if that response would not be the response of "right thinking" people. In Mawe v. Piggott (1869), IR. 4 C.L. 54, a priest brought an action for libel against a person who published of him that he was an informer against political offenders. In Ireland, then as now, it is difficult to imagine a more odious accusation, or one better calculated to cause hatred and contempt or to deter association with a person. However the action failed. The Court held that since an informer was a person who assisted the police in the discharge of their duty, no matter what the state of local opinion might be, no right-thinking person would hold the plaintiff in any lower esteem by reason of the fact that he was an informer, but on the contrary such people would think all the more of him for that reason. Several subsequent cases have taken the same position: Carter-Ruck, 3d ed. at p. 36.

Accordingly a test of "defamatory matter" which aimed to reflect the common law accurately should refer to right thinking persons, although in Canada this has been held to mean ordinary or reasonable persons: Murphy v. LaMarsh, (1970), 73 W.W.R. 114 at 119 (B.C.S.C.), aff'd [1971] 2 W.W.R. 196 (B.C.C.A.). Is there some other way of referring to the people among whom the reputation should be protected? If there is honour among thieves, should the law help them to maintain it?

Trivial Insults

It has already been mentioned that the existing scope of "defamatory matter" extends even to trivial insults. Should a revised definition include a standard of seriousness or materiality to avoid petty lawsuits? Or is reputation so damaged by small slights that the law should protect it on all occasions?

Certainly it is correct that if the defendant can prove that the plaintiff suffered no loss at all then the action will fail. This is a difficult proposition for a defendant to prove. No doubt actions based upon trivial insults, if successful, would recover derisory damages only. However, the judicial process is a sophisticated and expensive one. It can be expensive to mount a successful defence. Further, the court system is publicly funded. One may question whether it should be available to the thin-skinned plaintiff whose pride or vanity has been wounded.

Some ways of reducing frivolous or trivial actions are:

- to abolish the rule that damages are presumed, so that to win a lawsuit the plaintiff would have to prove damages even from the trivial insult;
- to include an element of seriousness in the definition of defamatory matter; and
- to create a defence of triviality.

The Australian Law Reform Commission favoured the latter approach. The Commission commented as follows at paragraph 191 of its 1979 report:

> Firstly it was argued that triviality should not be treated as a defence. Courts should consider it in applying that part of the definition of defamatory matter

> which refers to a publication which 'tends to affect adversely' the reputation of a person. If a matter is trivial, it is trivial because it is regarded as harmless or virtually harmless. The difficulty with this approach is, however, that the definition describes the type of publication which is defamatory. The defence is intended to cover publications of that type which are made under such circumstances as are unlikely to cause damage.
>
> Secondly, it was argued that the problem of triviality could be met simply by giving the court a power to transmit an action to a lower court, if in all the circumstances it is thought more proper that it be heard there. This argument misconceives the purpose of granting a defence for trivial defamatory publications. The purpose is not to ensure that the damages will be low but to avoid petty litigation entirely.
>
> Thirdly, it was argued that if there is to be a correction remedy available to the plaintiffs a defamer should be made to correct even in a trivial case: the non-likelihood of damage should simply be reflected in a denial of damages. The alternative view was that there are some defamations, particularly those with limited circulation, which are simply too trivial for the law to worry about. The court's time should not be taken up adjudicating petty squabbles. The Commission favours this view; it recommends a complete defence as a disincentive to frivolous actions where the matter and the particular circumstances of the publication are such that the plaintiff is not likely to be harmed."

Thus the ALRC felt that the definition of "defamatory matter" should not contain a requirement of "seriousness" because the definition "describes the type of publication which is defamatory." No doubt this is so, but the reasoning is not easy to follow. More important, the definition describes that which is actionable. Further, if the aim is "to avoid petty litigation entirely" then creating a defence of triviality may ensure that such actions are unsuccessful but will not exclude them altogether. The onus of establishing the defence will be upon the defendant.

If damages were not presumed in defamation actions, the person who had been trivially insulted might hesitate to sue lest he or she should lose for inability to prove damages. The plaintiff would then be at risk for the defendent's costs. However, the presumption would have to be abolished for all actions in defamation. Formulating a method to limit this remedy to trivial actions would be extremely difficult.

If the judicial process should not be available where the published matter is trivial or slight, even though false, then perhaps the most effective manner of eliminating such litigation would be to introduce an element of seriousness into the definition of "defamatory matter". It would of course have to done in a way that would not encourage people to litigate the boundary between serious and trivial.

Limiting the right to sue for small insults would have the added benefit of enlarging the area of freedom of speech.

Summary: The Central Element Of "Defamatory Matter"

Protection of reputation should perhaps mean protection not only from slurs, but also from statements which significantly alter a person's reputation in a manner disadvantageous to the plaintiff. The test of significance should deal both with triviality and with the group of persons, "right thinking" or other, among whom the plaitiff wishes to maintain his or her reputation. Comments causing financial loss unrelated to reputation might however continue to be excluded from defamation.

Reform Issues

Comments are invited on the following issues:

- Should actionable "defamatory matter" include only matter which alters a person's reputation in a manner disadvantageous to that person? A suit in libel or slander places a defendant at a severe disadvantage when contrasted with a suit for malicious falsehood.

- Where a plaintiff suffers financial loss, but there is no alteration to reputation, is it appropriate to permit a suit in defamation? (The plaintiff is not of course without a remedy: a suit in malicious falsehood would lie in an appropriate case).

- Does the distinction between actions for defamation and actions for malicious falsehood make sense at all? Does the protection of reputation deserve such a procedural advantage over protection of financial interests?

- Should "defamatory matter" exclude that which is trivial or slight? Does it make a difference to the answer whether damage is presumed? If damages had to be proved in each case, the difficulty of doing so might sufficiently discourage suits for petty insults.

- Is the supposed opinion of "right thinking persons" an appropriate standard to judge damage to reputation? Is the opinion of the plaintiff's peers a better standard? If pure reputation continues to be protected, these are important questions. If financial damages must be proved, the questions become irrelevant.

Based on the foregoing discussion, it is possible to imagine a definition of defamatory matter like this:

> "Defamatory matter" is published matter concerning a person that tends to:
>
> (a) materially and adversely affect the reputation of that person among his or her peers; or
>
> (b) materially alter the perception held of that person in a way that deters [or may reasonably be expected to deter] his or her peers from associating or dealing with that person.

Chapter 5 - Death of a Party to an Action

General Background.

At common law an action in tort terminated upon the death of either party. Personal representatives could neither sue nor be sued for any tort committed against or by the deceased in his or her lifetime. While the Shakespearean notion is that

> The wrongs that men do live after them;
> The good is oft interred with their bones

the position at common law is that a person's wrongs (torts) are in fact interred with their bones.

Professor Fleming suggests that this rule has its origins in the criminal flavour of early tort remedies: The Law of Torts, 6th ed., p. 636. Early remedies were sufficiently penal in character that they could properly be held to abate if a party died pending suit. Gradually the restrictiveness of this rule was relaxed by legislation. In Ontario section 38 of the Trustee Act R.S.O. 1980 c. 512 provides for the survival of actions in tort except in cases of libel and slander.

Some Canadian jurisdictions, such as Alberta and Nova Scotia, have adopted the Uniform Survival of Actions Act, by which defamation actions are treated like any other tort. Others, like Manitoba and Saskatchewan, have provisions like those in Ontario. Most other common law jurisdictions make a similar exception. New South Wales and Tasmania are among the few that allow the survival of actions in defamation.

Why the exception? The Faulks Committee in 1975 suggested that the omission of defamation from the English "survival of actions" legislation was the product of legislative urgency. The various Commonwealth enactments had presumably just copied the English legislation.

This seems unlikely. The form of the legislation is not a list of torts that survive, but rather a general provision for survival with a specific exception for libel and slander. This is not the sign of inadvertence. Perhaps a better explanation is that the policy derived from an extension of the rule that no action lies for defaming the dead. While that rule, dealt with in Chapter 6 of this paper, is theoretically distinct from a fate of an action for defamation of a living person who later dies, it may have influenced the procedural provision.

Death of the Defendant

Essentially the purpose of a defamation action is to allow a defamed person to restore his or her reputation and to recover compensation for any loss that may have been suffered. The death of the defendent seems irrelevant to this purpose. Certainly the death of the defendant may affect the presentation of the defendant's case. However, this is no more or less critical in a suit for libel or slander than it would be in a suit for some other tort which does survive the death of a party.

The views of the Uniform Law Conference are clear from the Uniform Survival of Actions Act mentioned earlier. As well, other committees that have examined the issue have recommended that the death of the defendant should not terminate an action in libel or slander: Faulks Committee (1975); New Zealand Committee (1977); New South Wales Law Reform Commission (1971); and the Australian Law Reform Commission (1979).

Death of the Plaintiff

As regards the survival of the action itself, an argument can be made that only the individual plaintiff has an interest in his reputation, one that does not pass to his or her successors. The more common view appears to be that the interests protected in defamation should be treated for this purpose like those involved in other torts.

However a number of authorities have concluded that while it is desirable that an action survive the death of the plaintiff, the legislation should limit the damages which may be recovered by the legal personal representative of the deceased plaintiff.

Damages Recoverable by the Estate of a Deceased Plaintiff.

Damages recoverable in an action for libel or slander include compensation for loss of reputation (occasionally called solatium), reimbursement for any actual loss such as loss of earnings (special damage), and a component as a mark of disapproval for misconduct by the defendant (such as malice or a frivolous but persistent plea of justification). This latter is usually styled aggravated damages. Finally exemplary or punitive damages may be awarded in unusual cases of egregious behavious by the defendent.

The New South Wales Law Reform Commission felt that it would be wrong to allow recovery of any damages other than special damages by the legal personal representative of the defamed person. The Commission recommended the survival of actions for defamation but for the recovery of special damages only. A similar recommendation was made by the South Australian Law Reform Commission and the New Zealand Committee.

On the other hand the Faulks Committee recommended the survival of the action including a right of general recovery, as did the Australian Law Reform Commission. The ALRC felt it was unnecessary to introduce a special rule since the same result would be achieved in practice with general recovery, which nevertheless kept the flexibility to accommodate the unusual case.

> This Commission does not suggest a special rule. In practice it is unlikely that significant general damages will be awarded following the death of the plaintiff but there may be cases where a court concludes that the plaintiff did suffer humiliation or hurt though little economic loss. Where a plaintiff suffers physical injury he may recover damages, in other types of action such as negligence, for pain and suffering. If he dies before judgment that element does not cease to be recoverable but, as a matter of practical reality, the damages given for it tend to be much lower. The common sense of the court can be trusted to adjust damages to the circumstances of the particular case.

(ALRC 11 para. 107.)

Simplicity of the law would promote a single rule for all rather than a special provision for the deceased plaintiff.

Reform Issues

- o Should an action in libel or slander survive the death of either party? If so, should recovery of general damages be permissible, or only actual losses?

Chapter 6 - Defamation of the Dead

Ontario law imposes no liability for publishing a defamatory statement about a dead person. None of the relatives, the friends or the business associates of a dead person can bring an action based upon statements about that dead person, no matter how false or malicious or injurious they may be, unless the statements are also defamatory of the living. Very few jurisdictions permit such an action to be brought. There is no right of action in England or Scotland, in any state of Australia, in any province of Canada, nor in any state in America.

This rule is a perennial matter for comment in reviews of the law of defamation. The Saskatchewan paper to the Uniform Law Conference of Canada (Proceedings of the Sixty-Ninth Annual Meeting, 1987) concluded that "reputation is worthy of the law's protection at any juncture before or after death" (p. 128).

The Australian Law Reform Commission recommended that legislation should provide some new protection: an action could be brought within three years of death by some categories of persons with a view to vindicating the reputation of the deceased. In England the Faulks Committee on Defamation, reporting in 1975, recommended that the close relatives of a deceased person should be entitled to sue, for five years after a person's death, for the publication of matter defamatory of the deceased person. The West Australian Law Reform Commission, reporting in 1979, endorsed the recommendation of the ALRC.

All of these committees agreed that while an action should lie, damages should not be available. The judgement alone would serve as vindication of the deceased's reputation. The Saskatchewan paper argued that by eliminating damages the new right of action would be less likely to inhibit the writing of history. None of the other committees provided reasons for eliminating damages as a remedy but it seems fair to assume that they had similar reasons. The remedy is not intended to enrich the plaintiff's survivors.

By contrast with the above recommendations, the Porter Committee on the Law of Defamation, reporting in 1948, concluded that no change should be made to this aspect of the law:

> Historians and biographers should be free to set out facts as they see them and to make their comment and criticism upon the events which they have chronicled. But to produce the strict proof of the statments contained in their writings which the English law of evidence requires, becomes increasingly difficult with the lapse of time. If those engaged in writing history were compelled, for fear of proceedings for libel, to limit themselves to events of which they could provide proof acceptable to a Court of Law, records of the past would, we think, be unduly and undesirably curtailed.

In criticizing this conclusion the Faulks Committee felt that its predecessor gave insufficient consideration to the interests of the public and of the near relatives of the deceased. It should be noted, however, that a minority of the Faulks Committee opposed the new right of action.

Both the New South Wales Law Reform Commission and the South Australian Law Reform Commission, reporting in 1971 and 1972 respectively, also opposed the creation of this new right.

While the weight of research opinion may lie on the side of those contending that a right of action should be created, it is instructive that none of the jurisdictions involved has implemented those recommendations.

Reform Issues

Comment is invited on the following issues:

- Should a new right of action be created based upon defamation of the dead?

- If such a right of action is created, how should the following concerns be dealt with:

  (i) Any new right of action must necessarily interfere with freedom of speech. Can this further interference with freedom of speech be justified by reference to the existence of a problem of "yellow journalism" for which there is no empirical evidence?

  (ii) Should the availability of the right of action be limited:

  - as to the standards of liability: only on proof of knowledge of falseness of the defamatory material?
  - as to the standing to bring the action: relatives only, friends, colleagues, general public?
  - as to the availability of remedies: general damages, vindication or rectification (and costs) only?
  - as to time limits: one year, three years, five years after the death of the defamed person?

  (iii) Should the law impose upon historical researchers and investigative journalists the onus of proving facts in a court of law, even upon a civil standard of proof, as a consequence of publishing material about a deceased person? (General procedural reforms of the law of defamation could independently resolve this issue.)

Chapter 7 - Defamation in a Work of Fiction

In every defamation case it is necessary for the plaintiff to prove that the defamatory matter referred to him or her. Occasionally an action will be brought in which a plaintiff will claim that he or she has been defamed in a work of fiction. No doubt it is very common for an author or playwright to draw upon events and people from life when creating a work of fiction.

If the plaintiff can satisfy the court that he or she can be identified as the person portrayed in the work of fiction then the defendant will be liable in damages. This exposes a paradox: by definition fiction is untrue. It may draw upon real life and real people, but essentially it will be a creature of the imagination. Accordingly the defence of justification (truth) will not be available to the defendant writer. Likewise the defence of comment will be unavailable - that defence requires a substratum of facts upon which a comment is based. Absolute privilege and qualified privilege would not be available: it is difficult to imagine that the publication of a book or the production of a play or film could be regarded as a privileged occasion, as the law now stands.

Accordingly once the plaintiff succeeds in satisfying the court that he or she can be identified as the person portrayed in the work of fiction the defendant is in a very difficult situation.

Of course, there are cases where fact is loosely dressed up as fiction, just as there are cases where the work of fiction contains only the nucleus of fact which has been the stimulus for the creative spirit. In the former case it is quite proper that a defendant should not escape liability for the publication of defamatory matter by the expedient of dressing up the material in the guise of a work of fiction. In the latter case, however, considerable injustice will be done to the defendant if he or she is liable in defamation. Indirectly in the latter case the community suffers through the suppression of the creative spirit.

S, Portrait of a Spy

The dilemma can be illustrated by considering the litigation which arose from publication of the book S, Portrait of a Spy, written by the novelist Ian Adams. The facts of the case are summarized in "Libel Law, Fiction, and the Charter" by Darlene Madott in (1983), 21 Osgoode Hall Law Journal 741. The novel was built around a theme of a spy scandal in the RCMP, in which the central character, S, is portrayed as an intelligence officer of the RCMP who is also a double agent for the KGB and the CIA - a traitor to his country. Adams and his publisher were sued by Leslie James Bennett, who had been involved in a public spy scandal involving the RCMP. The points of similarity between S and Bennett were that both were, or had been, intelligence officers in the RCMP and both were asthmatics. However, Bennett, unlike S, had not been a double agent and traitor. Unfortunately for the purposes of clarifying the law the case was settled, rather than litigated, but evidently it was settled on the basis of the liability of the defendant.

Similar cases have occurred in other jurisdictions. The Australian author Frank Hardy was prosecuted for criminal defamation on the basis of his novel Power Without Glory. In California the author Gwen Mitchell was found liable for characterizations in her novel Touching in Bindrim v. Mitchell (1977), 155 Cal. Rptr. 29.

Regard must be given to the position of the plaintiff. If some sort of complete defence were created for works of fiction it might encourage the publication of pseudo-fiction: defamatory facts disguised as fiction. On the other hand, the genre of "faction" - an artful blending of fact and fiction as a historical novel - is recognized as a legitimate expression of creative activity. Presumably where living people are portrayed, authors will have to take care not to defame them.

How then to strike a balance between the two competing interests? A number of alternative approaches could be considered - creating a new defence available to the creator of a work of fiction; limiting the remedies available to the plaintiff (eg. by confining the plaintiff to actual damages); by shifting the evidentiary onus so that the plaintiff has the onus of proving damage or malice as an element of a successful action. No doubt other approaches might be considered as well.

A New Defence

A defence styled "literary privilege" might be created. The defence would have the following elements:

- the defamatory matter was published in a form the substance of which would be viewed as a genuine work of fiction; and
- the defamatory matter was published in good faith.

The reference to "genuine work of fiction" is intended to address the problem of exploitation of the defence by disguising a defamatory fact as privileged fiction. This defence should not however become one based on artistic merit. Further, an author should not be at liberty to insert defamatory asides into an otherwise fictional narrative. The good faith requirement would preclude the publication of malicious material from obtaining the benefit of the defence.

Limiting the Remedies Available to the Plaintiff

An alternative approach would be to confine the plaintiff to the recovery of actual damages where the defamatory matter is contained in a work of genuine fiction. There seem to be two major difficulties with such an approach. First, it may work injustice for a plaintiff where his or her reputation has been severely damaged but with no pecuniary loss. Second, it seems difficult to rationalize treating literary fiction differently from other publications in terms of the extent of the damages which may be recovered by the successful plaintiff - the difference between the two forms of publication lies in the community interest in promoting artistic endeavour. If these criticisms of the "limitation of remedies solution" are accepted, then it follows that the publication of literary fiction should attract a defence which, if made out, would be a complete defence and not merely operate to reduce damages.

Onus of Proof

A variation of the second alternative would be to reverse the onus where the action is based upon the publication of literary fiction. As mentioned earlier in this paper, the plaintiff in a defamation action has the benefit of the presumptions of falsity, damage and malice. Where the publication is in the special category of literary fiction the plaintiff might be required to discharge the onus of proving damage, pecuniary or other, for example. Arguably, this is more attractive than the second alternative in that, once the onus has been discharged, the plaintiff could recover compensatory damages for the injury to reputation as well as reimbursement of actual loss. However, as with the second alternative, the criticism may be made that it is conceptually unsound to distinguish between literary fiction and other material on the basis of the onus borne by the plaintiff. The true distinction lies in the importance of the occasion, akin to qualified privilege, which perhaps should attract a defence. (Qualified privilege is dealt with at length in Part 3 of this paper on defences.)

Reform Issues

Comment is sought on the following issues:

o Should a new defence be created of "literary privilege" where the defamatory matter is contained in a publication which generally would be viewed as a genuine work of fiction? How should such a work be defined?

o Alternatively, in an action based upon a work of fiction, should the plaintiff be limited to the recovery of actual damages only? Should the plaintiff's remedies be limited in some other way?

o Alternatively, in an action based upon a work of fiction, should the general onus of proof which otherwise applies in a defamation action be altered so that the plaintiff has the onus of proving damage or falsity of the material?

o Should the cause of action based on a work of fiction have to include an element of malice on the part of the defendant, to be pleaded and proved by the plaintiff? In the alternative, should a defence of a literary work be obliged to show that the defamatory matter was published in good faith (i.e. without malice in the defamation law sense), in order that "literary privilege" should not become "artistic license"?

Chapter 8 - Defamation of a Group

At common law a defamatory statement is not actionable if it refers to a large group or class of persons. The reason for this distinction lies that for a defamatory statement to be actionable, it must refer to the plaintiff. Thus there is a problem of identification where the matter is defamatory generally rather than specifically. Professor Fleming comments that the common law "sets its face against civil sanctions for vilification, not of individuals, but of a whole class of persons distinguishable by race, colour, creed or calling, principally for fear of unduly inhibiting political discussion and criticism": Fleming, 6th ed., p. 506. However, if the defamatory words are directed at a group that is small or completely ascertainable, so that what is said of the group is necessarily said of every member of it, then the words will be actionable at common law: Knupffer v. London Express Newspaper Limited [1944] A.C. 116 (House of Lords).

In ordinary cases of defamation the law protects reputation and possibly some degree of financial interests. It is far from clear that a group has a reputation in the sense usually used in this field. The group may be hard even to define, let alone describe in a way consistent with a reputation. This threshhold difficulty may suggest that the whole problem of group defamation is not a matter for libel and slander law but for a community relations or anti-discrimination policy, to be solved with the tools appropriate to that area.

The rest of the chapter will however examine some of the implications of using defamation law concepts, and invite comment on their use for this purpose.

What Forms of Expression Should be Regulated or Proscribed?

Even trivial insults directed at an individual are actionable under the law. If this rule were extended to groups without amendment, any offensive term for a group of people could be actionable by a member of the group so defamed; "ethnic jokes" could give rise to suits at the instance of a member of the group held up to ridicule; and it might be that the publication of research material on eugenics may be fraught with danger. Are private lawsuits the right means to eliminate these practices, if they are all to be eliminated?

Reasons against attempting to regulate such expressions include the following:

- Suppression of such expressions will not eliminate them but rather will drive them underground.

- In a liberal society the response to false expressions of the sort used as examples should be to rely upon the resilience of society and the good sense of its citizens to resist being seduced by such statements. Toleration of diversity and resilience to criticism is the mark of a liberal society.

- Such statements may be a tolerable illustration of the freedom and diversity of our society.

If it is accepted that the law of group defamation should require something more than a casual or trivial comment, nonetheless great difficulties arise in determining a higher test. Even the requirement of a "material adverse effect", suggested earlier for individual cases, is very hard to demonstrate when applied to members of a group. The effect would probably be too remote from the cause. Rules suggested for verifying a class for a civil class action do not really meet the problem of a defamed group.

Presumably it is for this reason, amongst others, that those who have recommended the creation of a right of action for group defamation have advocated a quite different threshold of "defamatory matter" for such a suit. For example, the New South Wales report recommended a test of threatening physical harm, intimidating, promoting or expressing hatred or exposing to hatred, serious contempt or severe ridicule any minority group or its members. The difficulty with such a test is that threatening or intimidating is already prohibited by criminal law, as is incitement to racial hatred.

Such an overlap between the criminal law and the law of defamation indicates a degree of confusion. The public interest that infuses this topic may take it completely out of the sphere of private civil actions.

What Form of Sanction is Appropriate?

Patrick Lawlor, in his report on the subject, identified three options:

- a statutory action in tort for discrimination,
- an action for defamation created by amendment of the Libel and Slander Act; and
- an action on the grounds of discrimination or defamation under the Ontario Human Rights Code.

Lawlor expressed a preference for the latter (Group Defamation, Ministry of the Attorney General of Ontario, March 1984, p. 60).

As mentioned earlier in this paper, a cause of action for defamation confers a number of very significant advantages upon the plaintiff. These advantages, particularly those of a procedural nature such as the presumptions of falsity and of damage (reverse onus provisions), stem from the evidentiary problems which would otherwise seriously hamper the plaintiff. However, the corollary of creating such a potent weapon must be that its application should be carefully controlled. A civil action for grop defamation may not be subject to the appropriate level of control.

Reform Issue

Comments are sought on the following issue:

- Should a right of action in defamation be created for cases of defamation of a group? If so, should it be subject to any limits beyond those of an ordinary action for libel or slander of an individual?

Chapter 9 - Standard of Care: Unintentional Defamation

The tort of libel or slander is a tort of absolute liability - the intention of the defendant, or his or her degree of fault, are both irrelevant (except in those cases where malice must be established to rebut a defence of fair comment or qualified privilege). Thus a defendant is generally liable for the publication of defamatory matter even though the defendant did not intend to refer to the plaintiff and even if the defendant did not know the plaintiff existed: Hulton v. Jones [1910] A.C. 20 and Newstead v. London Express [1940] 1 K.B. 377.

The strict liability standard in defamation law may be tested against the requirements of the Charter, particularly the proportionality test developed in R v. Oakes. First, the strict liability standard is intended to protect the reputation of a person defamed, albeit innocently, by another. Undoubtedly one can make much of the argument that, as between an innocent defamer and an innocent victim, the law should err in favour of providing redress for the victim. This line of argument found favour with the Porter Committee in England and the Australian Law Reform Commission. In neither case was it necessary to consider the effect of a constitutionally protected freedom of expression.

In R. v. Oakes, Dickson C.J. relied on the statement of Lord Denning in Bater v. Bater [1950] 2 All E.R. 458 at 459 that the degree of probability required to establish a proposition increases according to the importance of the subject matter. Dickson C.J. decided that a very high degree of probability must be established by the party seeking to justify a violation of a constitutionally protected freedom.

Applying this test, one may conclude that the interest of protecting a person whose reputation is injured unintentionally cannot justify limiting the freedom of expression of the unintentional defamer.

If this view is incorrect, it is useful to apply the second criterion, the proportionality test. Are the measures adopted - imposing strict liability for the publication -carefully designed to achieve the object in question? "They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective." R. v. Oakes [1986] 1 S.C.R. 103 at 139. Two alternatives to absolute liability are liability if negligence is established and liability if malice is established.

Clearly a requirement for an element of actual malice is at the opposite extreme to absolute liability, whereas liability for negligent misstatements is a compromise position. It may represent a proper balance between protection of freedom of expression and protection of reputation. (See e.g. the remarks of Marshall, Harlan and Stewart JJ. in Rosenbloom v. Metromedia Inc. (1971) 403 U.S. 29).

Reform Issues

Comments are sought on the following issues:

- Should the law allow a suit in defamation only where the defamatory matter is published in circumstances involving intent, or malice, or recklessness, or negligence of the defendant?

- If so, should one or more of these elements need be pleaded and proved by the plaintiff to establish the cause of action? Or should falsity of the material create an onus on the defendant to prove a lack of negligence, essentially a "due diligence" defence?

PART 3 - DEFENCES

There are a number of defences available to a defendant, some of which are peculiar to a suit in a defamation action, others of general application. The major defences are: (i) justification (truth); (ii) fair comment; (iii) absolute privilege; (iv) qualified privilege; (v) fair report (Libel and Slander Act sections 3-4); and (vi) retraction of unintentional defamation. Each of these defences will be reviewed in turn.

Chapter 10 - Justification (Truth)

Conceptually the notion of the defence of truth is very simply stated, deceptively so. If a defendant publishes material shown to be defamatory at law, the law presumes the falsity of the words and the defendant has the burden of proving the truth of the imputation of which complaint is made. However it is not necessary that the defendant prove exactly and meticulously the truth of the precise statement made - it will suffice if the "substance" or "sting" of the defamatory matter is true.

The aspect of this defence currently the subject of the most debate is the burden of proof placed on the defendant. While the burden was upheld under the Charter in Coates v. The Citizen, this does not prevent a change in the law if one is held desirable. The defendants in Coates argued that the truth or falsity of the defendants' allegations was best known to the plaintiff, so the plaintiff should have to demonstrate that they were false. The plaintiff took the position that he had not taken the initiative of publishing anything. Those who wished to profit from printing stories about him should have to satisfy themselves that the stories are true. Once they have done that, they should also be in a position to demonstrate it in a court of law.

Publishers for profit may arguably be in a different position than people who defame casually, both in their resources to check their stories ahead of time, or in response to a suit, and also in their capacity to harm the plaintiff seriously if their stories are false. The law gives some kinds of publishers procedural advantages. Should it impose this burden on them and not on individual defendents?

It may be that certain plaintiffs should be held to invite stories about themselves, as well. Disturbing the repose of someone who has not sought public attention perhaps should incur an onus of proof that writing about a public figure does not. This concept is explored at greater length in Chapter 14 on qualified privilege.

The presumption of falsity applies in England, Australia, the United States, New Zealand and France, as well as in Canada: see the survey in Carter-Ruck, 3rd ed., chap.26 - 30.

Besides the onus of proof, the defence of truth presents other difficulties to the defendant who wishes to rely on it. "What is truth?" is never an easy question, and it has led the law into many technicalities. In addition to conceptual problems, there is a further trap for the unwary defendant: an unsuccessful plea of justification may aggravate the damages: Simpson v. Robinson (1848), 12 Q.B. 511 and Cassell & Co. Ltd. v. Broome [1972] A.C. 1027.

Here are some examples of the difficulty of defending with "truth":

(i) Darsley v. Crystal Publications Ltd. (1946), West Norwood Times, 5 July. (Cited by Carter-Ruck at pp 91-92). A newspaper published a factual article drawing attention to two matters involving a local councillor. Carter-Ruck states that "the facts clearly indicated preferential treatment of the councillor." Both the allegations of fact published by the newspaper were proved to be true. However, the court held that the imputation which the article carried and which the defendant had to prove, was that the plaintiff had secured preferential treatment. The defendant had proved only that the plaintiff had received preferential treatment and the defence of truth failed.

(ii) Breasley v. Odhams Press Ltd. (1953), Times, 13-15 November. (Cited by Carter-Ruck at p. 91). A newspaper published a report of allegations of race fixing made against the plaintiff, a jockey. The author pointed out that there was no truth in the accusations and went on to praise the plaintiff's skill and racing tactics. The plaintiff conceded that the article was an accurate account of incidents after the race in question when some disappointed punters voiced the allegation of race fixing reported in the newspaper. Even though the account was accurate the defence of truth failed. In short, the accuracy of the report is not enough if the content of the words reported is false. Further, the publication of defamatory matter, even for the purpose of rebutting it, is actionable.

(iii) English & Scottish Co-op. Properties Mortgage and Investment Society v. Odhams Press Ltd. [1940] 1 K.B. 440. Upon professional advice the plaintiff society included in its annual return an item as profit which the official auditor felt should not be shown as such. The official issued a summons for wrongfully making a return of profits that was false, primarily for the purpose of resolving the issue finally and without intending to impute any improper motive to the society. The defendants published a report of the matter under the heading "False Profit Return Charge Against Society." The Court of Appeal held that the word "false" was ambiguous and might mean "incorrect" or "fraudulent". Again the plaintiff's suit for damages for defamation was successful.

(iv) Bishop v. Latimer (1861), 4 L.T. 775. A newspaper published a report criticizing a lawyer for the manner in which he treated his clients. Byles J. pointed out that the libel was in general terms. The libel "is not how he treated [his clients] in this particular case, but how he treats them generally, and even if you succeed in proving that the report is correct, so as to justify the inference that in this instance he treated his client ill, that would not answer the implied charge in the libel that he so treats his clients generally."

Innuendo

The law of defamation recognizes that the meaning to be attributed to a form of words may not always be ascertained by analysis of the words complained of. The context will of course almost always be relevant in determining the meaning of the words. Sometimes, if the words have a technical or slang meaning, it may be necessary to refer to some specialist knowledge possessed only by a limited number of persons in order to ascertain meaning. Occasionally ordinary words may have some special meaning, other than their natural and ordinary meaning, because of some extrinsic facts (i.e. facts not reported in the text of the publication itself). These special meanings are called legal (or true) innuendoes. (A common innuendo - in the sense of a sly suggestion - is embraced within the ordinary concept of the meaning of a form of words).

For example, ordinarily it would not be defamatory to say of a person that he or she was seen entering a named house. However, it would become a derogatory implication for anyone who knew that the house was a brothel: Rubber Improvement Ltd. v. Daily Telegraph Ltd. [1964] A.C. 234. The meaning of the words would need to be ascertained by reference to facts extraneous to the published material itself.

The defence of "truth" is quite an unwieldy shield. The problem of "what is the truth?" is particularly troublesome in innuendo, where one form of words may be capable of a number of constructions, each of which may be the subject of a cause of action, and each of which must be justified. As the Darsley v. Crystal Publications (the councillor's prefential treatment) case indicates, identifying what must be justified can be very elusive. Further, the truth must be established by the ordinary evidentiary process upon the balance of probabilities. And the defendant must always bear in mind that if the defence fails, aggravated damages may be awarded.

Libel and Slander Act, section 23.

Section 23 of the Libel and Slander Act has modified the defence of justification. The section reads as follows:

> In an action for libel or slander for words containing two or more distinct charges against the plaintiff, a defence of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the plaintiff's reputation having regard to the truth of the remaining charges.

Where the defendant's publication makes a series of charges and the defendant is able to justify some but not all of those charges, then at common law the defence would fail. Under section 23, the defence can still succeed even though all of the charges are not justified, if those which are not justified do not materially injure the plaintiff's reputation in the circumstances.

One shortcoming with this reform is that the plaintiff decides the charges to put in issue. Where a publication contains a number of charges a careful plaintiff may elect to sue on only those charges that he or she knows the defendant will be unable to prove, excluding those which can be proved (and which may be very damaging). The other charges are therefore irrelevant to the suit and section 23 has no application.

Partial justification under section 23 also does not apply where there is only one allegation and that allegation is not justified though another charge would be justified. For example, if a newspaper alleges that the plaintiff is a convicted murderer, while the conviction is for manslaughter, section 23 will not assist. Such situations are not unusual, given that newspapers (and, indeed, non-lawyers generally) do not apply the same exactitude of language that lawyers (profess to) employ when commenting on legal subjects.

Logically the provisions of the common law do make sense. The fact that nine separate allegations are true does not make a tenth charge true. The significance of the nine true allegations lies in establishing the character of the plaintiff (as distinct from the reputation of the plaintiff) and in measuring the damages (if any) to which the plaintiff may be entitled as a result of publication of the one false allegation.

Reform Issue

Comments are sought on the following issues:

- o Should the defendant continue to bear the burden of proving the truth of the defamatory statements? Does the character or motive or purpose of the defendant make a difference to the answer? Does the character or public status of the plaintiff make a difference?

- o Should section 23 of the Libel and Slander Act be recast so that the justification of one allegation does not operate as a defence to a suit upon a separate, false allegation?

- Alternatively, should the court be required to have regard to the whole of the publication which is the context for the allegations sued upon (and not just to the part selected by the plaintiff), and the extent to which the defendant justifies the matter concerning the plaintiff in that publication?

Chapter 11 - Fair Comment

It is a complete defence to an action for defamation that the words complained of are fair comment made in good faith and without malice on a matter of public interest. The elements of the defence are as follows:

- the material must be comment as distinct from statement of fact;
- the subject of the comment must be a matter of legitimate public interest;
- the facts upon which the comment is based must be set out or indicated in the publication of which complaint is made, not necessarily in detail but sufficiently to provide or indicate a basis of fact for the comment;
- the statement of facts must not itself be defamatory;
- the comment must be fair in the sense that it is relevant to and derived from the facts stated or indicated.

The statement of facts will not be defamatory if published on an occasion of absolute privilege (described in the next chapter), even if the allegations themselves are not true.

Interestingly, the common law is not entirely settled on how "fair" is to be measured. In Canada the situation at common law, following Chernesky v. Armadale Publishers Ltd. [1979] 1 S.C.R. 1067, is that the test to be applied is a subjective test: the comment must be the honest opinion of the person publishing it. In other words, at common law a newspaper may not raise the fair comment defence in relation to letters to the editor (i.e. containing the opinions of third persons) unless the sentiments expressed in the letter are also the sentiments of the publisher.

A similar situation applies in Western Australia as a result of the decision in Bridge v. Tozer and West Australian Newspapers [1978] W.A.R. 177. However in other common law jurisdictions the position is still unclear.

In Ontario the common law has been altered by section 25 of the Libel and Slander Act (passed in 1980), which is as follows:

> Where the defendant published defamatory matter that is an opinion expressed by another person, a defence of fair comment by the defendant shall not fail for the reason only that the defendant or the person who expressed the opinion, or both, did not hold the opinion, if a person could honestly hold the opinion.

An objective test is thus applied in these circumstances.

At common law each of the facts stated in the publication, and which form the basis of the comment, must be shown to be true. If the defendant fails to prove one, even if it is comparatively unimportant, the defence would fail at common law: Kemsley v. Foot [1952] A.C. 345 at 357-358. As a result of section 24 of the Act, the defence of fair comment will succeed if sufficient facts are proved so that the comment is "fair" having regard to those proved facts. The section follows:

> In an action for libel or slander for words consisting partly of allegations of fact and partly of expression of opinion, a defence of fair comment shall not fail by

reason only that the truth of every allegation of fact is not proved if the expression of opinion is fair comment having regard to such of the facts alleged or referred to in the words complained of as are proved.

Possible Reform of the Defence of Fair Comment

The Australian Law Reform Commission recommended the abolition of the requirement that the comment be on a matter of public interest. This requirement, the ALRC said, served to protect only privacy, and privacy should be protected directly by appropriate legislation, rather than obliquely by libel and slander law.

The ALRC also recommended that the comment should have to be the "genuine" opinion of the maker. There would be no need for it to be reasonably based, and the existence of malice would be irrelevant. Can a comment be genuine opinion and malicious in law at the same time? The Commission thought that the defence should be named "comment" rather than "fair comment", as confusion sometimes occurs between the meaning of fair as "balanced and reasonable" and the meaning as "honestly held" (the latter being the appropriate meaning in the expression "fair comment").

The ALRC proposal would significantly widen the defence of fair comment. Some people may have reservations about this, even if greater statutory protection were given to privacy. The effect of the defence of fair comment is to protect the publication of defamatory comment. If, as suggested earlier in this paper, the threshold of what constitutes "defamatory matter" were lifted (by requiring material injury to reputation before a publication becomes actionable), and if the plaintiff had to plead and prove fault on the part of the defendant, it would likely be unnecessary to loosen the requirements for establishing the fair comment defence. Combining these reforms with a more readily available defence of fair comment could promote the freewheeling publication of defamatory opinions. Accordingly the "public interest" element should probably be retained as a component of the defence of "fair comment", at least if the other two changes are made.

However, it is more difficult to find a compelling reason why malice should be relevant. If two theatre critics publish similar critical reviews of a play, both critics holding their opinions honestly, but one critic being actuated by malice towards the playwright, then one critic could be sued successfully for libel while the other could maintain the defence of fair comment. This is an unfortunate inconsistency.

Reform Issue

Comments are sought on the following issues:

- Should the elements of the defence be prescribed by legislation?
- Should the existence of malice on the part of the defendant be relevant to the defence?

Chapter 12 - Absolute Privilege (Parliamentary Privilege, Judicial Privilege, Executive Privilege)

Absolute privilege is a complete bar to an action for defamation, no matter how false or malicious the words may be. Absolute privilege is now granted to:

- statements made in the course of parliamentary proceedings (parliamentary privilege);
- statements made in the course of judicial proceedings (judicial privilege); and
- communications between high officers of state in the course of their duties (executive privilege).

This immunity from liability encourages free speech in the discharge of the business of the institutions where it is accorded, full and frank discussion being essential to the public good. In addition, the fact that people hold opinions and state them in such forums may be considered more important than their truth. To some extent as well, the statements may be subjected to close examination for their truth by people with an interest in correcting false impressions, so the danger of damage to reputation may be less than it would be from unchecked statements in other places.

In addition to the above, certain communications between solicitor and client are protected by absolute privilege.

The Extent of Parliamentary Privilege

Parliamentary privilege "extends to the deliberations of legislative and quasi-legislative bodies": Williams, The Law of Libel and Slander in Canada 2nd ed. p. 69, including the deliberations of a committee of a House of Parliament or a provincial legislature. Its appropriateness for other bodies, such as municipal councils, might be subject to review.

Reform Issue (Parliamentary Privilege)

Comment is sought on the following issue:

> Is any change necessary to the present common law on absolute parliamentary privilege?

The Extent of Judicial Privilege

Similar questions arise in relation to the privilege attaching to judicial proceedings. This privilege is somewhat different from the others in that much of what is said is said under oath, and subject to cross-examination. The speech involved may be more controlled and less one-sided than that in other forums that benefit from absolute privilege.

Does the privilege apply to administrative tribunals? In Trapp v. Mackie [1979] 1 All E.R. 489, the House of Lords considered whether the privilege applied to evidence given at a local inquiry before a Commissioner under the Education (Scotland) Act 1946. Lord Diplock confirmed that the privilege does extend to tribunals which, although not courts of justice, nevertheless act in a manner similar to courts. He considered four criteria:

- under what authority does the tribunal act?
- what is the nature of the question into which the tribunal must inquire?
- what procedure is used by the tribuanl?
- what are the legal consequences of the conclusions reached by the tribunal?

The greater the similarity with courts, the greater the chances that absolute privilege would apply. His Lordship held that the presence or absence of any one or more court-like trait was not determinative, but the cumulative effect of the characteristics would create the result.

Should commercial or other arbitrations be protected by absolute privilege? Some share a significant number of the factors canvassed by the House of Lords in Trapp v. Mackie. Some are more in the public interest than others. Labour arbitrations, for example, have been made compulsory under statute to reduce industrial strife. Other kinds may be encouraged as a means of helping citizens to resolve their own disputes. This may not be a sufficient element of public interest to justify a freedom to defame. The proceedings are not subject to control by a publicly appointed person, unlike courts and administrative tribunals. At present the better view is that arbitral proceedings are not covered by absolute privilege: Carter-Ruck, 3d ed, p. 111.

Reform Issues (Judicial Privilege)

Comments are sought on the following issues:

- Should judicial privilege extend to matter which is published in the course of the proceedings, or in any official record, of a court in Ontario or elsewhere?

- Should the privilege extend to similar matter published in the course of an arbitration under the the authority of a provincial statute? Is this the natural extension of a general applicability to quasi-judicial proceedings? Where should the line be drawn? Is adjudication, or an obligation to follow the rules of natural justice, enough?

Extent of Executive Privilege

The privilege applies to communications at the highest level of government and the civil service. However it is unclear how far down the ranks the privilege extends. A report by a senior military officer to his superior is protected by absolute privilege: Dawkins v. Lord Paulet (1869), L.R. 5 Q.B. 94, but communications between the Commissioner of Police and his deputy may not be: Merricks v. Nott-Bower [1965] 1 Q.B. 57 at 73.

If executive communication is not protected by absolute privilege, then qualified privilege will apply. Both the Australian Law Reform Commission and the West Australian Law Reform Commission recommended that executive privilege should be abolished, on the basis that qualified privilege was the appropriate level of protection for these communications. The publication of defamatory matter by a senior public servant in the course of his or her duties would not be actionable unless activated by malice.

Reform Issues (Executive Privilege):

Comment is sought on the following issues:

- Should executive privilege be abolished or limited?
- Should other aspects of the defence of absolute privilege be settled by suitable legislation?

If absolute privilege were to be codified along the lines of the comments made, the law could look like this:

(1) The defence of absolute privilege confers immunity from suit for defamation.

(2) The defence of absolute privilege applies only where the defamatory matter is published in the circumstances spcified in subsection (3).

(3) Absolute privilege attaches to the publication of matter:

(a) in the course of the proceedings, or by the authority, of a legislature or a committee of a legislature, in Ontario or elsewhere;
(b) in a document presented to, laid before, or published by order of, or under the authority of, a body specified in paragraph (a)[is any control needed to this authority to defame?];
(c) in an official or authorized record or a true copy of an official or authorized record of the proceedings of a body specified in paragraph (a);
(d) in the course of the proceedings, or in any official record of the proceedings of a court, whether in Ontario or elsewhere;

(e) in the course of the proceedings, or in any official record of the proceedings of a tribunal other than a court, whether in Ontario or elsewhere, provided that:
   (i) the tribunal is authorized by law;
   (ii) the tribunal is empowered to adjudicate upon the matters brought before it; and
   (iii) the tribunal is governed by the rules of natural justice;

(f) in the course of the proceedings, or in any proper record of the proceedings, of an arbitration conducted pursuant to statutory authority and whether conducted in Ontario or elsewhere; and

(g) in a document prepared for the purpose of and used in any proceedings referred to in paragraph (d), (e) or (f).

Chapter 13 - Qualified Privilege

Qualified privilege, like absolute privilege, protects from suit the publication of defamatory matter on certain occasions. The occasions protected by qualified privilege are much more numerous than those protected by absolute privilege. Like absolute privilege, the rationale for qualified privilege is public policy - the importance of the occasion is such that frank discussion must be encouraged and full report made of it even if untrue remarks are made about someone at the time. Unlike absolute privilege, qualified privilege may be defeated only by proof of malice on the part of the defendant. "Malice" has the wide meaning used in defamation law, that is to say not just spite or ill-will but also any other wrong or improper motive for publication of the defamatory matter.

Qualified privilege has been extensively supplemented by statute. At common law the defence is available in circumstances involving a reciprocity of duty or interest between publisher and recipient. Statute has enlarged the availability of the defence to include "fair reports" of various matters. In Ontario the relevant provisions are sections 3 and 4 of the Libel and Slander Act.

Again the uncertainty of the common law shrouds the availability of this defence. The editors of Duncan and Neill on Defamation write that the statements to which qualified privilege applies can be grouped as follows:

(a) statements made in pursuance of a legal, social or moral duty to a person who has a corresponding duty or interest to receive them;
(b) statements made for the protection or furtherance of an interest to a person who has a common or corresponding duty or interest to receive them;
(c) statements made in the protection of a common interest to a person sharing the same interest;
(d) fair and accurate reports of judicial proceedings, however published, and whether or not published contemporaneously with the proceedings;
(e) fair and accurate reports of Parliamentary proceedings, and Parliamentary sketches;
(f) extracts from Parliamentary papers and public registers;
(g) certain reports published in newspapers or by broadcasting which are protected by virtue of the provisions of the Defamation Act 1952, s. 7 and Schedule [in Ontario, s.3 of the Libel and Slander Act].

The categories enumerated are illustrations only and are not exhaustive. In fact, in Perera v. Peiris [1949] A.C. 1, the Privy Council stated that the application of the defence could not be reduced to a list of categories. Lord Uthwatt explained that the enquiry which should be made is whether the "common convenience and welfare of society" or "the general interest of society" require the availability of the defence.

This useful flexibility comes at the expense of certainty. Certainty for the sake of certainty is not the only legal virtue, but in defamation law uncertainty may lead to self-censorship - the suppression of information which the public has a right to know. Uncertainty may also of course result in costly errors, such as the publication of matter under the misapprehension that the occasion is privileged. There are, accordingly, strong arguments that the defence of qualified privilege should be fully codified in order to reduce this uncertainty. Before looking at possible reforms it is necessary to survey the defence at common law and under statute.

Common Law - Statement Made in Pursuance of a Duty to a Person with a Corresponding Duty or Interest to Receive it

The basis for this category of privileged occasion is the communication of information in performance of a duty to protect the lawful interests of another. The duty may be a legal duty or a moral or social duty, e.g. the duty, when offering a character reference, to do so frankly; the duty to provide information to the police. Hence the duty need not be one which may be enforced by some legal process, whether civil or criminal. "Duty" connotes an obligation in the broad sense of the duty of a good citizen.

There must be "reciprocity" between the parties to the communication, in other words, the person making the statement must have a duty to communicate it to the person receiving it, and the latter must have a duty to hear it from the maker. The reciprocity must exist in fact. A bona fide and reasonable, but mistaken, belief by the informant that the recipient has a reciprocal duty or interest is not enough: Beach v. Freeson

[1972] 1 Q.B. 14. While it is undesirable to protect the publication of defamatory matter by busybodies and rumour mongers, it may be thought reasonable to protect the publication of matter which is volunteered in circumstances where the informant believes reasonably that he or she has a duty to inform the recipient.

Another difficulty with this area of the common law is that an informant who provides information for a fee to persons having an interest in receiving the information will be unable to claim protection of the privilege. Most notably this affects credit bureaus and publishers of commercial information. In Macintosh v.Dun [1908] A.C. 390, the Privy Council held that the publisher of such a newsletter could not claim qualified privilege. Quaintly, their lordships held that the defendant was actuated by an improper motive, namely pecuniary gain, and that the motive for the publication was not the performance of a legal, social or moral duty. The motive was profit.

There seems to be no clear theme to the range of occasions which may be protected by qualified privilege either at common law or under statute. Clarity of focus might be aided if the term "qualified privilege" were retained for the defence at common law, and the statutory extensions of the defence were consistently referred to as "fair report" (See Chapter 16).

Reform Issue

Comments are sought on the following issues:

o Should the publisher be required to show a duty to publish in order to benefit from qualified privilege? Should it be sufficient that the recipient had an interest or apparent interest in receiving the information or that the publisher had a reasonable belief in that interest?

- Should it be relevant that the matter was published for reward?

- Should malice continue to invalidate the defence?

Chapter 14 - Qualified Privilege: Public Figures

Since the decision of the United States Supreme Court in New York Times v. Sullivan (1964), 376 U.S. 254, American law has given qualified privilege to the publication of otherwise defamatory material about "pulbic figures", if the publisher has acted without malice. This has not yet been taken up in other common law jurisdictions.

Sullivan arose out of an advertisement in the New York Times about aspects of the civil rights movement in the South of the United States. Verdicts for the plaintiff, a police commissioner, were overturned on appeal to the Supreme Court. To get the right to hear the case from a state court, the appellant newspaper had to give its arguments a constitutional aspect. The reasoning in the case thus turns on discussions of U.S. constitutional law that are not immediately applicable here. The general principle may however be a useful one to promote free speech about matters of public interest, which is at the heart of so much of the law of qualified privilege.

Subsequent cases tested the extent of the class of "public officials". The supervisor of a publicly owned ski recreation area was held to be a public official in Rosenblatt v. Baer (1966), 383 U.S. 75. In 1967 the test was extended from "public official" to "public figure". In Curtis Publishing Co. v. Butts (1967), 388 U.S. 130, a football coach was held to be subject to the lower level of protection of reputation. It was enough that the published matter relate to public issues and events to trigger the defence now made available.

In Time Inc v. Hill (1967), 385 U.S. 374, the pendulum swung even further, by extending the test to one of "public interest". As a result, a family who had been held hostage by escaped convicts, and who were therefore involuntary actors on the public stage, were unable to recover damages for an article on their ordeal in Life magazine. However, in Time Inc v. Firestone (1976), 424 U.S. 448, the plaintiff in a noted divorce case was held not to be a public figure to the extent that defamatory remarks were protected by qualified privilege.

The kinds of result that may be permitted by the public official/public figure/public interest concept is shown by Ocala Star-Banner Co. v. Damron (1971), 401 U.S. 295. In that case the defendants published a defamatory statement, involving an allegation of past criminal conduct, about the plaintiff, a Mayor. The defendants admitted that the story was wholly false and that it was published as a result of "mistaken identity". The plaintiff's suit failed as he was unable to prove "actual malice" within the meaning of that expression in New York Times v. Sullivan.

The question of malice continues to be hotly contested in American cases. For example, in Falwell v. Hustler Magazine Inc. (unreported, 1988) the Supreme Court extended the actual malice requirement. It was admitted that the published material was entirely fictitious, and that the defendant knew this when it was published (apparently satisfying the test for liability under New York Times v. Sullivan). However, it was argued that the material was so obviously a parody (the article portrayed a sex act by Mr. Falwell's mother in a Washington telephone booth) that no one would view the article as anything other than fiction. This argument was accepted by the Supreme Court, to all intents and purposes supplementing the defence of justification (truth) with a new defence of Obvious Untruth. The defence remains however in the context of discussion of a public figure, who may apparently be parodied more than a private citizen.

In the United States, even private citizens defamed by the press must prove fault, whether negligence or otherwise, on the part of the press to win a suit. The common law presumption of malice, that the defendant knew or was reckless of the falsehood of the statements made, has been abolished on the ground that an uninhibited press is more important constitutionally than reputation: Gertz v. Robert Welch, Inc. (1974), 418 U.S. 323.

Qualified privilege for statements about public figures may win support for favouring free speech on matters of public interest. However, two reasons for caution suggest themselves:

- The concept of public official or public figure may be too fluid. The interest in free debate about public issues may not justify free defamation of what can be a very broad category of person.

- Allowing the defence for "public figures" is dangerous because it is the activity of the defamer itself that may contribute to the status of the defamed person as "public". Media interest can thus provide a defence for media irresponsibility.

Of the various law reform bodies that have examined this issue, only that of New Zealand has favoured a Sullivan rule. The Faulks Committee, all the Australian commissions, and the Uniform Law Conference of Canada reports have recommended against such a privilege: Proceedings of the Sixty-Fifth Annual Meeting of the Uniform Law Conference, 1983, p. 124 - 126.

The defendants in Coates v. The Citizen (1988), 85 N.S.R., 216 A.P.R. 146, argued that the Charter required such a privilege in Canadian law, but the court did not agree. No doubt other attempts will be made to establish a "public figures" privilege through the courts if it is not accorded by statute.

Reform Issue

Should Ontario law allow a qualified privilege for the publication of defamatory material about public officials or public figures?

Chapter 15 - Statutory Qualified Privilege: Fair Report

Availability of the defence of qualified privilege has been extended dramatically by statute in many jurisdictions. In Ontario sections 3 and 4 of the Libel and Slander Act give particular protection to newspapers and broadcasters. This chapter examines these statutory provisions and their limits.

The statute deals essentially with the republication of defamatory words originally published, in the legal sense, in a forum benefitting from absolute privilege for the speaker, or in another place whose proceedings are considered of such public importance that the report itself is considered more important than the reputation of anyone who might be slandered there.

Publication with malice is not protected, whatever the other characteristics. In addition, publication of blasphemous or seditious or indecent material may still lead to liability (s. 3(5). A more general limitation is that the statutory privilege applies only to the publication of matter of public concern or for the public benefit (s. 3(6)). A newspaper is not free to report anything that was said simply to titillate its readers.

The most important limit to qualified privilege is that a newspaper or broadcaster must give the person defamed the opportunity to reply to the defamation (s. 3(7)). This does not necessarily constitute a retraction by the publisher, since the publisher has no control over or even knowledge of the facts. It does serve to give the innocent person a chance to tell another side of the story.

Subsection 3(1) - Proceedings of Public Bodies

Subsection 3(1) of the Act extends the defence to a fair and accurate report, contained in a newspaper or in a broadcast, of the following proceedings (if they were open to the public and the publication was not made maliciously):

- proceedings of a legislative body or committee thereof in the British Commonwealth that may exercise any sovereign power acquired by delegation or otherwise;
- proceedings of any administrative body that is constituted by any public authority in Canada;
- proceedings of any commission of inquiry that is constituted by any public authority in the Commonwealth; and
- proceedings of any organization whose members represent any public authority in Canada.

Thus a report of the proceedings of a Commonwealth legislature is protected but not, for example, a report of the proceedings of the United States Congress. A report of the proceedings of a territorial legislature, e.g. the legislature of the Northwest Territories, might not be protected; this would depend upon the interpretation of the "sovereign power" qualification in the first item on the list.

Finally, the defence is available only to reports published in a newspaper or in a broadcast. The definition of "newspaper" in paragraph 1(1)(b) of the Act would include monthly news magazines but it would not include, for example, quarterly magazines. Reports contained in pamphlets or books are not protected. The Uniform Law Conference recommended that the defence be extended to any publisher who is "willing to publish at his own expense some suitable statement of explanation or contradiction which is likely to reach the same audience as his original report." Proceedings of the Sixty-Fifth Annual Meeting, 1983, p. 122.

Subsection 3(2) - Meetings of Public Interest

Subsection 3(2) extends the defence to a fair and accurate report in a newspaper or in a broadcast of the proceedings of a meeting lawfully held for a lawful purpose and for the furtherance of discussion of any matter of public concern, whether the admission to the meeting is general or restricted, unless the publication was made maliciously.

Again, the privilege extends only to newspapers and to broadcasts as defined. Because the statute talks of meetings dealing with a matter of general concern, it is at least doubtful whether the defence would apply to a report of proceedings at a company general meeting, at a trades union congress, at an industry conference or meeting such as a meeting of the Chamber of Commerce.

Perhaps the law should extend as well to reports of the proceedings at such meetings. In a pluralistic society the lives of citizens are shaped by decisions made by trade union and business leaders as well as by the decisions of representative politicians.

Subsection 3(3) - Documents of Public Information

Subsection 3(3) extends the defence to a fair and accurate synopsis in a newspaper or broadcast of any document issued for public information by or on behalf of any body mentioned in subsection 3(1) or any meeting mentioned in subsection 3(2) unless the publication is tainted by malice.

How limiting are the words "issued for the information of the public". Arguably, this might extend only to a document which recites factual information, rather than to commentary such as a parliamentary green paper or a similar discussion paper. The linkage between subsection 3(3) and the preceding subsections might also be queried. Many branches of the government publish documents which are designed to inform the public or to stimulate discussion, yet the executive arm of government is barely mentioned in subsections 3(1) and 3(2).

For example, the Ministry of Health might issue, as an executive act, a pamphlet about AIDS. Would the publication of a synopsis of the pamphlet attract qualified privilege under subsection 3(3)? To do so it would be necessary to characterize the Ministry of Health as an administrative body constituted by a public authority in Canada. This is not at all clear and in any event it is a clumsy and indirect method of achieving the legislative aim.

Subsection 3(4) - Decisions of Associations

This subsection applies the privilege to a fair and accurate report in a newspaper or broadcast of the findings or decisions of associations relating to a member of the association, unless the report is tainted by malice. The types of associations specified are associations formed to promote the arts, science, religion or learning; to promote any trade, business, industry or profession, or to promote any game, sport or pastime. The statute does not clearly apply to unincorporated associations, though no reason in principle seems to exclude them.

The privilege is interesting because comments made at the meetings of the associations are not themselves privileged, unlike those made in legislatures. Reports of the decisions have a better status than decisions published by the associations themselves.

Reform Issues

Comment is sought on the following issues:

- Should the statutory defence be renamed "fair report"?

- Should protection be accorded to a "fair and accurate report" in whatever form? Can an inaccurate report be fair? Should the defence be limited to reports "published in a newspaper or by broadcasting"?

o Should the list of protected occasions be redefined to include:

- (A) proceedings of a legislature whether in Canada or elsewhere, including a committee of a legislature;
- (B) proceedings in public of any international organization of countries, of legislatures or of governments, or their representatives;
- (C) proceedings in public of any international conference at which governments are represented or of any international court or arbitral tribunal;
- (D) proceedings in public of a municipal council, school board, board of education, board of health, or any other board or local authority formed or constituted under any public act of a legislature in Canada, or of a committee of any such municipal council or board;
- (E) proceedings of any association, whether incorporated or otherwise, or any part or committee thereof, relating to a member of the association or to a person subject to control by the association. There seems no point in enumerating categories of association - those formed to promote the arts, business, sport etc. If the matter satisfies the public interest/ public concern test, then it should not matter what type of association is involved;
- (F) proceedings at a general meeting of a body corporate;
- (G) any public meeting;
- (H) a synopsis of any record or document kept by any government department or agency being a record or document open to public inspection; and
- (I) proceedings in a meeting of commissioners authorized to act by or pursuant to statute or other lawful warrant or authority?

o Should the only limitations on the right to publish with qualified privilege be:

(A) that the matter arises from occasions contained in the statutory list;

(B) the matter is one of public interest or concern (what guidelines are desirable on this point?);

(C) the matter is not blasphemous, seditious or indecent (now subsection 3(5));

(D) the publication is not tainted by malice; and

(E) the plaintiff was accorded the right of explanation or contradiction by the defendant (now subsection 3(7)).

Section 4 - Court Proceedings

Section 4 extends the defence of privilege to include a "fair and accurate report without comment in a newspaper or in a broadcast of proceedings publicly heard before a court of justice, if published in the newspaper or broadcast contemporaneously with such proceedings" unless the defendant has refused to insert in the report a reasonable statement of explanation or contradiction by or on behalf of the plaintiff. The protection thus extended does not authorize the publication of any blasphemous, seditious or indecent matter.

The important differences between sections 3 and 4 are as follows:

- section 4 does not require that the defendant demonstrate the public interest or concern in the material;
- under section 4, but not under section 3, publication must be contemporaneous;
- under section 4 the protection does not extend to comment; and
- malice will defeat a section 3 defence but not a section 4 defence.

The reason for some of these differences will be obvious. What is happening in court now is automatically considered of public importance. Trials in the past do not benefit from privilege, however, because the publisher has time to check the accuracy of defamatory remarks. Because the reports do not by definition contain comment, malice is irrelevant. Comments on trial proceedings are subject to the usual legal liabilities.

Once again, the defences are available only to newspapers and broadcasters, probably because the requirement of contemporaneous publication would apply only to them anyway. The corresponding English statute does not require contemporaneous publication, however. Perhaps this limit should be reviewed in the context of all statutory qualified privilege.

Reform Issue

- Should qualified privilege for reports of court proceedings be extended to publication in any form, not merely to newspapers and broadcasts, and the requirement of contemporaneous publication removed?

Chapter 16 - Retraction of Unintentional Defamation

Ontario is one of the few jurisdictions in which the defence of retraction is available. Section 5 of the Libel and Slander Act provides that no action for libel in a newspaper or broadcast lies unless the plaintiff gives written notice of the alleged libel within six weeks of learning of it. The publisher then may avoid general liability by publishing a timely and conspicuous retraction. Compliance with the rules must be demonstrated by the publisher. The plaintiff may still recover actual damages for the libel, proof of which is of course on him or her.

The provision effectively nullified for these cases the common law presumption of malice, which puts the defendant under the burden of proving that it had not intended to harm the plaintiff. It makes intention relevant to defamation in a way it had not been previously. The existence and desirability of the presumption should be kept in mind when discussing the extension of the remedy of retraction; as one expands, the other contracts.

The defence is subject to qualifications. The libel must have been published in good faith and in mistake of the facts. It must not impute a criminal charge. In the case of a candidate for public office, the retraction must occur at least five days before the election.

Provisions to a like effect are found in Saskatchewan, British Columbia, and Alberta.

The defence has much to commend it. Most important, it is remedial - it goes to the heart of the matter by endeavouring to rectify or mitigate the damage caused by publication of defamatory matter. As the measure is remedial, in fact, should the court have the power to to order retraction as a remedy for a successful plaintiff (instead of or along with damages), even if the defendant publisher has not attempted it?

Perhaps, however, a defendant should be ordered to publish a retraction only with his or her consent. The defendant should have the option of paying damages. This may be particularly compelling where the defamatory matter is comment (i.e. opinion). It may be thought invidious to oblige an unsuccessful defendant to retract an opinion that is honestly held. On the other hand, such problems could be left in the discretion of the court.

The right to retract should perhaps be available as well where the libel alleged a criminal charge. This limitation was perhaps included because an imputation of criminal misconduct was regarded as particularly damaging, so that retraction (and a real remedy limited to actual damage only) was inappropriate. As a result, a retraction defence would be available where the libellous matter related to, say, sexual behaviour but not where it related to, say, an allegation of keeping a gaming house. Such value judgments may be difficult to sustain.

The limit to publication in a newspaper or by broadcast may be based on the view that retraction must occur very quickly after publication. If the publication is in a quarterly magazine then retraction would not occur before the next regular issue of the magazine, three months hence. There is an alternative, however. The Act could provide an alternative defence of effective retraction, the effectiveness to be provedby the defendant. The quarterly magazine could retract by advertising in a newspaper or circlating a notice to its subscribers, for example. It could publish a retraction in the next issue and argue, perhaps successfully, that such a retraction was in fact satisfactory to remedy the plaintiff's loss of reputation.

The Uniform Law Conference recommended against extending this defence beyond newspapers and broadcasters. Their importance to public democratic discussion would outweigh the interests of the plaintiff in the presumption of damages, but other publishers should not have this advantage. In practice restricting plaintiffs to actual proved damages meant preventing recovery, an effect not to be encouraged by the law. Proceedings of the Sixty-Ninth Annual Meeting, 1987, p. 146.

This defence should not be confused with the effect of an apology in general. Publishing an apology is not a defence at common law, but it can serve to mitigate damages otherwise payable by the defendant. This rule should continue in effect whatever the extent of the statutory right of retraction: B.C. Law Reform Commission Report on Defamation, p. 65.

Reform Issues:

Comment is sought on the following issues:

- Should the court be given a discretion to order the defendant to retract or correct the libel, as well as or instead of paying damages? The court would need the power to specify the content, manner of publication, frequency of publication and so on, of the retraction statement.

- Should the defence be available:

  - to publishers other than newspapers and broadcasters?
  - to allegations of criminal charges?
  - to publishers who have made retractions they can demonstrate to have been effective, even if not technically complying with the present statutory rules? Should the factors contributing to effectiveness be specified, such as manner, timing and distribution of the retraction?

Chapter 17 - Mere Distribution of Defamatory Matter

One of the essential ingredients of defamation is that the defamatory matter must have been published to a third person, that is, someone not the speaker or the person defamed. The tortious element of the defendant's conduct is not the act of speaking or writing, but that of communicating the defamatory matter. Further, each communication of defamatory matter is a separate publication. The distribution of a single allegation can involve a number of persons, each of whom may be separately liable for defamation as a publisher of it.

In short, the author of the libel need not be its publisher. Most commonly this occurs when the publisher is a bookseller, librarian, newsagent or the like. Such people may have no knowledge of the content of what they distribute and no way of controlling it anyway. As a response to the problem confronting them, the common law has developed the defence of innocent dissemination. A mere distributor of a libel will escape liability provided he or she is able to satisfy the court:

(a) that he or she did not know that the publication or document in question contained or was likely to contain defamatory matter, and
(b) that this ignorance of the contents of the publication or document in question was not due to any want of care.

(See the judgments of Romer L.J. in Vizetelly v. Mudie's Select Library Ltd. [1900] 2 Q.B. 170 and Lord Esher M.R. in Emmens v. Pottle (1885), 16 Q.B.D. 354).

These conditions are fairly circumscribed. Where, for example, a newspaper or magazine has a reputation for being contentious, and perhaps scandalous, a distributor of the magazine or newspaper may be at risk. If a book is launched amid a good degree of publicity about its controversial contents, a bookseller may have difficulty satisfying the condition that he or she did not know that the book was likely to contain defamatory material.

The potential liability of, for example, a librarian, is an example of a collision between the interests of two innocent persons - the innocent victim of the defamatory material on the one hand and the innocent librarian, whose library stocks the book, on the other.

Some recent judicial comments on this dilemma are found in the case of Goldsmith v. Sperrings Ltd [1977] 1 W.L.R. 478 (Court of Appeal) This case was a battle in the war between Sir James Goldsmith and Private Eye magazine. He sued the editor, the publishers, and the main distributors of the magazine, including Sperrings Ltd., a company which owned a number of newsagencies. Counsel for both parties conducted the case on the assumption that the distributors were prima facie liable,both because the notorious reputation of Private Eye and because the material had appeared in three successive issues, making it untenable to maintain that the defendants did not know that the magazine was likely to contain defamatory material. The defendants attempted an imaginative but unsuccessful defence based on other grounds.

One of the majority justices remarked as follows:

> If the effect of the law is to diminish freedom of the press, Parliament will have to decide where the balance is to be struck between freedom and the protection of the defamed citizen. Some, no doubt, will argue against any restraint being imposed upon distributors of newspapers. Some may even wish to go so far as to call for a legal obligation to be imposed upon all newsagents and others engaged in the business of newspaper distribution to provide an outlet for all newspapers and periodicals, whatever they publish. Others, however, will argue that the existing law provides in the action against a secondary destributor a valuable additional remedy for an individual who is defamed by a scurrilous or financially dubious publication. We do not have to consider these questions". [per Scarman, L.J. at 501]

Lord Denning in dissent suggested that the onus of proof of knowledge of the libel should lie on the plainiff. Instead of the defendant's having the burden of proving his or her innocence, it would be for the plaintiff to prove that the defendant knew, or ought to have known, that the publication defamed the plaintiff. Ordinarily this might be done by the plaintiff giving notice to the defendant that the plaintiff claimed the publication to be defamatory of him or her. Should the defendant - the distributor - continue or commence distribution of the publication this would be done with notice.

Lord Denning thought that it should not be enough, other than in a most unusual case, to infer knowledge on the part of the defendant from the mere fact of the controversial reputation of the magazine or newspaper concerned. "The freedom of the press depends on the channels of distribution being kept open" (p. 488), and imposing liability for defamation based on reputation of the publication would lead to legal intimidation of distributors of controversial material.

Another option was suggested by the Australian Law Reform Commission in its report Unfair Publication: Defamation and Privacy at p. 99. The ALRC recommended that, subject to one qualification:

> specified disseminators be granted protection for publishing defamatory matter solely in their capacity as disseminators, thereby satisfying one interest. At the same time the person who claims to be defamed should have the right to obtain an injunction restraining publication by any person, including a protected disseminator, if he can satisfy a judge that the material is defamatory and otherwise indefensible, thus satisfying the other interest.

There are a number of difficulties with this approach. An anticipatory injunction would be available in every case where the Court is satisfied that a person "is likely... to publish defamatory matter... concerning the applicant," (ALRC draft Bill subclause 31(1)), although the Court is also constrained by the vague requirement that "in all the circumstances it appears to the Court to be just to do so" (subclause 31(2)). This seems to be an unduly permissive approach to a remedy which turns on a threatened publication. Such anticipatory injunctions are occasionally granted at present provided the plaintiff is able to prove precisely what the threatened publication is going to contain. Usually the applicant plaintiff will be required to give an undertaking to pay damages to the defendant, in the event that the action ultimately fails, to compensate for the loss occasioned by the injunction.

On a number of occasions, the Courts have warned that an anticipatory injunction is a remedy which is to be granted only in an exceptional case: Bonnard v. Perryman [1891] 2 Ch. 269 (Court of Appeal). The remedy stifles debate and is antithetical to free speech. Further, the question whether any libel exists is traditionally a matter for a jury, not for the judge sitting alone, as in an application for an injunction. It seems very unwise to enlarge the circumstances in which such a remedy may be granted.

There are other difficulties with the injunction approach. In the case of the distributors of a newspaper or magazine there may well be thousands of possible outlets which would need to be enjoined. Each would need to be notified of the proposed order. Also, an application of this sort is essentially interlocutory in nature with great reliance being placed upon affidavit evidence. A defendant does not have the amount of time to prepare a defence that is available before a trial. In addition, the truth or otherwise of the material, and the evidence to establish this, may not be known to the defendant who is a mere distributor of the material, and that defendant cannot prepare a full defence as a result.

Injunctions against the head publisher might solve some of these problems. Distribution networks for books and magazines often have key points at which distribution could be stopped fairly effectively. The efficiency argument may be soluble. The restraint of speech argument appears stronger.

Reform Issues

Comments are sought on the following issues:

- Should the common law defence of innocent dissemination be made available to a mere distributor of publications, whether for reward or otherwise, i.e. someone who is neither the author of, nor the printer of, the material?

- If a distributor of publications may be liable in damages if he or she knew, or ought to have known, that the publication contained material defamatory of the plaintiff, should proof of this lie with the plaintiff?

- Should anticipatory injunctions be made more readily available to defamed persons, either absolutely or in return for exempting innocent distributors from liability?

PART 4 - REMEDIES AND PROCEDURAL ISSUES

Chapter 18 - Damages

The only remedies available to a plaintiff in a defamation action are damages, injunctions and retraction by the defendant. It is only in comparatively recent times that the alternative "remedy" of retraction has been created. As noted in Chapter 17, under present law retraction is not really a remedy but a means of defence. It is suggested in that chapter that courts be empowered to order retraction in appropriate cases. Chapter 18 contained comments on injunctions and their limits.

Historically the common law of libel and slander has been preoccupied with the remedy of damages, with somewhat unfortunate results. In this chapter it is proposed to survey this remedy and to suggest reform.

Damages

Damages has been the traditional remedy for defamation. An award of damages may include components under a number of headings - special damages for actual loss suffered; general damages to compensate generally for the damage to reputation; aggravated damages to compensate for additional hurt to the plaintiff brought about by the defendant's conduct (e.g. by persisting in a defence of truth or justification); and punitive or exemplary damages which are designed not to compensate the plaintiff but to punish the defendant if his or her conduct in publishing the defamatory matter was insolent, malicious or vindictive.

Damages must of course be retained as a remedy. However, there is a need to review the role of damages in the overall armoury of remedies available to a successful plaintiff. It is also necessary to reconsider the basis upon which an award of damages is calculated.

The Presumption of Damage

The common law presumes that the publication of a libel, or of certain kinds of slander, causes damage to the plaintiff. The defendant must prove on the balace of probabilities that the plaintiff has suffered no harm. This presumption is a feature of the law of many countries. It is open to question whether this burden is a proper one for a defendant in times in which the freedom of expression is to be encouraged.

Limits of Damages as a Suitable Remedy

There are two major difficulties with damages as the primary remedy in a suit in defamation. First, the general role of damages in tort should be compensatory. Over the years a considerable body of law has developed in the area of assessment of damages, eliminating some of the uncertainty in assessing damages in most tort matters. This is not the case in defamation matters. In assessing general damages there is no tangible harm whose value may be assessed. As a result damages awards are often contentious and frequently are characterized as erring on the side of generosity. Indeed the windfall nature of an action in defamation itself acts as an inducement to sue - a stimulus compounded by the ease with which statements may be held to be defamatory, discussed earlier in this paper.

Second, the law has in a sense overreacted to the unsuitability of damage awards by developing a wide range of defences to defamation actions. Many operate even when the material published is clearly defamatory and probably therefore harmful to the plaintiff's reputation. The result is to deny liability altogether in many cases where a more appropriate response might be to find remedies better able to provide compensation to the defamed person.

Accordingly, it seems to be timely to reform the remedies available in a defamation action with a view to achieving two aims:

- to reduce the reliance upon damages by tailoring other remedies which are more appropriate as a remedy for the tortious conduct; and
- by introducing a more systematic approach to the assessment of damages with a view to reducing the "lottery" element which is involved in the process.

The former task has, as noted, been anticipated in previous chapters. The principal remedy not now available seems to be orders for retraction or correction, probably combined with awards of whatever actual monetary damages are demonstrable. Some greater use of prior injunctions may also help plaintiffs, but the cost of this remedy in inhibiting free speech may make it undesirable.

Assessment of Damages

Damages are a matter for the jury. Very little guidance is provided to jurors on the range of damages which should be awarded. Duncan & Neill illustrate the dilemma in which the jurors are placed:

> Following the decision in Savalas v. Associated Newspapers (1976) The Times,16 June, p. 1., the foreman of the jury wrote the Times newspaper as follows: 'It is no betrayal of the secrets of the jury room to confess that, with the other jurors, I entered the Royal Courts of Justice on June 14th with not the remotest idea what compensation is paid for anything except perhaps a dented boot and wing; haloes are outside our normal terms of reference. Apparently that is why we were asked. If that is so, the court had the outcome it deserved from the appointed procedure.' (The Times, 22 June 1976).

(Duncan & Neill on Defamation, 2nd ed., p. 126 footnote 4.)

The Faulks Committee recommended that the jury should be asked to decide the range of damages, and not to quantify the precise award, i.e. to determine whether the damages should be substantial, moderate, nominal or contemptuous. However, the terms "substantial" and "moderate" have no meaning in a vacuum. Probably most jurors would have very little idea whether "moderate" damages meant $5,000 or $50,000 in any particular case. Indeed many lawyers would be in a similar quandary.

Another suggestion is that the judge should direct the jury to award damages within minimum and maximum limits deemed by the judge to be appropriate to the circumstances of the case. The judge may be considered sufficiently expert to recognize a fair range. The Attorney General announced on February 9, 1989, that the Courts of Justice Act would be amended to give judges the discretion to express an opinion to the jury as to the range of damages in civil actions.

Punitive or Exemplary Damages

Punitive damages may be awarded in any suit in defamation where the defendant's conduct is thought to warrant punishment or deterrence of future misconduct.

It may be thought undesirable that a civil suit should be available as a vehicle for the punishment of a defendant. That is the function of criminal law, where the person exposed to the risk of punishment has the safeguards of a criminal trial. Those areas where tort law does allow for punitive damages are unusual - in trespass to land and trespass to person, in seduction and in defamation. The availability of punitive damages in a suit for defamation, but not in most other areas of tort law, is an illustration of the extraordinary priority which the law accords to protection of reputation.

Punitive damages are in practice rarely awarded as a component of overall damages in Canada. The most recent occasion appears to be the 1982 British Columbia case of Vogel v. Canadian Broadcasting Corporation [1982] 3 W.W.R. 97. In that case punitive damages of $25,000 were allowed, in a total award of $125,000, a very large award in historical terms in this country. The reasoning in that case on the issue of punitive damages is as follows:

> The question then arises whether the C.B.C., by reason of its size and power, is immune to deterrence by any monetary award which would not be unthinkable by the moderate standards which prevail in Canada. That would be so only if the irresponsible attitude which allowed the Vogel story to be published is an established one in the controlling minds of the coroporaion. Such a conclusion would not be warranted in view of the general reputation for excellence of the C.B.C.'s news services. There must be weighed, against the few demonstrated examples of irresponsibility and unfairness, the countless broadcasts which have shown a high standard of balanced and responsible journalism.
>
> The circumstances of the case call for the award of an additional amount against the C.B.C. as exemplary damages...

In most cases where punishment for misconduct is to be meted out, past good conduct is a factor in mitigation. The passage above indicates that the converse can be the case in assessing punitive damages in a suit for libel - the established reputation for excellence of the C.B.C. makes the organization amenable to deterrence through the medium of punitive damages.

On the other hand, the judge's favourable opinion of the C.B.C. reduced the amount of damages that he thought would be necessary to deter it from future misconduct. Perhaps the C.B.C. learned the value of a good reputation.

While it is unpalatable to see a defendant libel a plaintiff with profit in mind (e.g. with a view to boosting the circulation of a magazine), it may be thought equally undesirable that a plaintiff should profit from the punishment of the defendant.

A number of reports in other jurisdictions have recommended the abolition of punitive damages. The Faulks Committee so recommended in 1975, as did the ALRC report in 1979 and the New South Wales Law Reform Commission in 1971. The New Zealand Committee on Defamation in its 1977 report advocated retaining punitive damages but proposed that they be assessed by the judge rather than the jury.

Reform Issues

Comments are sought on the following issues:

- Should the court in a defamation suit be required, or allowed, to specify the minimum and maximum ranges within which the jury is to fix the award of damages?

- Should the criteria to be considered in assessing damages be codified? Such a measure would guide the court in fixing a range of damages.

- Should punitive (or exemplary) damages be abolished?

Chapter 19 - Procedure

Apart from the general complexity which besets an action in libel or slander, there are a number of specific procedural particularities. Those which may be most readily identified are:

- notice requirements and limitation periods; and
- inability to obtain broadcast tapes prior to action.

The Limitation Period - Notice Requirements of the Libel and Slander Act

Subsection 5(1) of the Libel and Slander Act reads as follows:

> No action for libel in a newspaper or in a broadcast lies unless the plaintiff has, within six weeks after the alleged libel has come to his knowledge, given to the defendant notice in writing, specifying the matter complained of, which shall be served in the same manner as a statement of claim or by delivering it to a grown-up person at the chief office of the defendant.

This notice requirement is a condition precedent to the commencement of an action for libel. Not complying with the provision will bar the plaintiff from commencing an action. If the proceedings have already begun then the action may be dismissed.

This provision applies only to libels published in a newspaper or in a broadcast. An action based upon a libel published in a quarterly magazine would not be subject to the notice requirement of subsection 5(1). Are there compelling policy reasons for confining the notice requirement to actions based upon libels published in a newspaper or broadcast?

The rule may be tied to the right of the newspaper to defend litigation by a timely retraction of the libel. Without a notice, the offender has no opportunity to retract. It may be felt that a retraction by its nature should not be too remote from the original misstatement. A periodical published less frequently than quarterly may not be considered able to afford the plaintiff a timely retraction in any event. On the other hand, this may be a risk properly allocated to the plaintiff; if he or she chooses to sue a year after publication, then the retraction will occur then too, however effective it may be.

No other provincial defamation legislation contains such a restriction to periodicals appearing frequently.

Limitation Period Proper

Section 6 of the Libel and Slander Act prescribes a limitation period of three months for an action for a libel published in a newspaper or in a broadcast. For an action based upon slander, or for libel published other than in a newspaper or broadcast, it is necessary to look to the Limitations Act for the limitation period. Paragraphs 45(1)(g) and (i) of that Act provide that the limitation period is two years for slander and six years for libel. The existence of such a disparate set of limitation periods in defamation law is difficult to justify.

The first question is the starting point for the limitation period. The two obvious choices are the date of publication and the date the person defamed becomes aware of the defamation. One problem with the latter time is that it is hard to predict and hard to prove. The publisher does not know when the period of risk will end. It cannot be conclusively demonstrated that the plaintiff will not adjust the alleged date of discovery to validate the suit.

It may therefore be preferable to start time running on publication, even if the plaintiff does not know about the defamation. The more remote the libel or slander in fact, the less likely is continued injury. Early litigation offers better remedies and perhaps in most cases the only effective ones. The law places a premium on protection of reputation, and a premium on speedy litigation may follow from this.

The Ontario Law Reform Commission recommended a two year limitation period in its 1969 Report on Limitation of Actions. The same period was included in a 1983 Ontario Bill (Bill 160) which derived from the OLRC report. The Saskatchewan paper to the Uniform Law Conference in 1987 made a similar proposal (running from publication), possibly because the Uniform Limitations Act prescribes two years for most kinds of action. In England, the Faulks Committee advocated a three year period starting from the time a complete cause of action first arose. The ALRC recommended that the limitation period should be three years from the date of publication, or six months from the date the plaintiff first became aware of the publication, whichever is the earlier. This recommendation was subsequently supported by the West Australian LRC in its 1979 Report on Defamation.

For the defendant there are evidentiary problems which increase with the time elapsed since publication. Few radio or television broadcasters would maintain broadcast tapes for years after publication. As the evidentiary onus upon the defendant is very heavy (because of the presumptions of malice, falsity and damages), the exposure to liability should perhaps be restricted to take account of this state of the evidence. Section 6 of the Libel and Slander Act now requires suits against newspapers and broadcasters to be brought within three months of the time the libel came to the attention of the defamed person.

Broadcast Tapes

Where the allegedly defamatory material has been published in some transient form (for example, a live radio or televison broadcast) there will be difficulty in proving the defamatory matter with precision. Once an action has been commenced, the plaintiff will be able to seek interlocutory relief to obtain access to broadcast tapes, for example by seeking Anton Piller orders or similar relief. However, before action the plaintiff has no right to demand access to such material.

The Report on Defamation by the British Columbia Law Reform Commission (1985) recommended the creation of a statutory right of access to such tapes. The legislative provision would read as follows (page 57 of the BCLRC Report):

> Where a person has reason to believe that he has been defamed in a broadcast, he may by a demand in writing delivered to the owner or operator of the broadcast station within four weeks of the broadcast, require the broadcaster to permit him to hear or view a tape of the broadcast, and receive a copy of the tape.
>
> Where a demand is received under subsection (1) the broadcaster shall within 48 hours, upon the tender of a reasonable fee by the person making the demand, permit the person making the demand to hear or see the tape, and provide him with a true copy thereof.

There are difficulties with such a provision. It imposes a significant burden upon a publisher; the statutory right could be used vindictively by a plaintiff; the words "reasonable fee" are undesirably vague; and the consequences of failure to comply with a demand are not stated. Conversely it is recognized that it may be inconvenient for a plaintiff to commence an action in order to obtain access to broadcast tapes which are the only precise record of the publication.

The defendant could be given a right to apply to the court for directions as to the amount to be tendered, or for relief from complying with the demand if it is frivolous or vexatious, or involves excessive expense. The financial burden involved in the making of an application to the court generally may be be borne more readily by a publisher than by the potential plaintiff. Failure to comply with such a statutory demand could be considered by the court when considering an order for costs in a subsequent action arising out of that publication.

Reform Issues

Comment is sought on the following issues:

o Should the requirement to give notice before action be extended to any action against a publisher in defamation, not merely to an action based upon libel in a newspaper or broadcast?

o Should the requirement to publish an address (in order to obtain the benefit of the notice and retraction rules) apply to the publication of any periodical publication, not merely to newspapers?

o Should a general limitation period be fixed at two years for any action in defamation, running from the date of publication?

o If so, should the special 3 month limitation period for actions against newspaper publishers and broadcasters be abolished?

o Should the law create a right of access to broadcast tapes, exercised by giving a statutory demand before action? Should publishers have a means of procedural relief from frivolous claims?

o Should the sanction for wrongful non-compliance with a demand for access be specified?